THE LAW
RELATING TO
CHEQUES.

WATSON.

THIRD EDITION.

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THE

LAW RELATING TO CHEQUES.

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PREFACE

TO THE THIRD EDITION.

SINCE the publication of the second edition in July, 1902, the cases of *Capital and Counties Bank* v. *Gordon* and *London City and Midland Bank* v. *Gordon* have been upheld on appeal to the House of Lords, with a variation not affecting the case so far as the cheques were concerned, but only as to the drafts (1903, A. C. 240). There has also been an important Privy Council case—*Imperial Bank of Canada* v. *Bank of Hamilton* (1903, A. C. 49).

Further, a bill was introduced and passed a third reading in the House of Lords, which had for its object the amendment of s. 82 so as to destroy the effect of the judgment in *Gordon's Cases* on the construction of the words "receives payment for a customer." Possibly this measure will be reintroduced in the coming session.

The Introduction has been omitted in this edition, and certain matters treated in the Introduction in former editions have been relegated to the text. *Young*

v. *Grote* has once again been referred to as bad law in the Privy Council case above cited, and the author feels obliged to consider it as of more than doubtful authority. Until, however, expressly overruled on the narrow ground on which it stands—viz., the duty of the drawer of the cheque to his banker—it will retain its place in the text.

ERIC R. WATSON.

COLOMBO,
January, 1904.

CONTENTS.

CHAPTER V.

CHAPTER VI.

CHAPTER VII.

CHAPTER VIII.

CHAPTER IX.

CHAPTER X.

CHAPTER XI.

TABLE OF CASES.

TABLE OF STATUTES.

THE

LAW RELATING TO CHEQUES.

CHAPTER I.

DEFINITION.

1.—A cheque is a bill of exchange drawn on a banker payable on demand. (S. 73) (*a*).

Cf. *Hopkinson* v. *Forster*, L. R. 19 Eq. 74. It is not an assignment of money in a banker's hands.

By construing s. 73 with s. 3, which defines a bill of exchange, we get the following definition of a cheque :—"A cheque is an unconditional (*b*) order in

(*a*) A reference to a section without citing any Act is a reference to the Bills of Exchange Act, 1882, hereinafter referred to as "the Act."

(*b*) A cheque with a receipt form attached, with this order "Pay . . . provided the receipt form at foot hereof is duly signed stamped and dated," is not a cheque within the Act, but it is brought within ss. 76 to 82 of the Act by the effect of s. 17 of the Revenue Act, 1883, see p. 64 (*J. Bavins, Jun. and Sims* v. *London and South Western Bank*, 5 Com. Cas. 1).

writing addressed by one person to another, being a banker, requiring the person to whom it is addressed to pay on demand a sum certain in money to or to the order of a specified person or to bearer."

The chief differences between a bill and a cheque are:—

(1) Bills are payable on demand (*c*) or at a fixed and determinable future time, *e.g.*, three months after date or after sight. Cheques are always payable on demand. There are thus no "days of grace" in the case of cheques. Bills are intended for circulation; cheques for immediate payment.

(2) A cheque requires no presentment for acceptance and no acceptance (*d*). The addressee of a cheque is not like the addressee of a bill, who, by accepting, becomes liable, if he dishonour the bill on presentment for payment, to a holder. A banker,

(*c*) Bills payable on demand, other than cheques, are practically not in use in this country.

(*d*) The custom of certain bankers of initialling cheques is not an acceptance. It only amounts to an admission that at the time the bank has funds enough of the drawer to meet the cheque. (See *Gaden* v. *Newfoundland Savings Bank*, 1899, A. C. 281; *Imperial Bank of Canada* v. *Bank of Hamilton*, 1903, A. C. 49.) Analogous is the custom of London City bankers of marking cheques as good which are presented after four o'clock. See *Robson* v. *Bennett*, 2 Taunt. 388. It adds to the credit of the drawer of the cheque that of the bank on which it is drawn.

if he dishonour a cheque, is not liable to the holder, but only to the drawer.

(3) Notice of dishonour is rarely necessary in case of a cheque, as it is excused if payment is countermanded, or the banker has no effects of the customer, the two common causes of dishonour. There is no noting or protesting of cheques on dishonour.

(4) A penny stamp covers any amount on a cheque, provided it be not post-dated; but a bill requires an *ad valorem* stamp, if payable after sight or after date.

For further essentials of a valid bill, and by the operation of s. 73, of a cheque, the reader is referred to s. 3, which it is not thought material here to set out.

2.—A cheque is transferable in its origin unless it contains words prohibiting transfer. Where a cheque is transferable in its origin, it continues to be transferable until it has been—

(a) Restrictively indorsed, or

(b) Discharged by payment or otherwise.

A cheque transferable in its origin is also negotiable, unless it is crossed not negotiable. Where a cheque is negotiable in its origin it continues to be negotiable until it has been—

(a) Crossed not negotiable by a holder thereof, or

(b) In circulation for an unreasonable length of time, or

(c) Restrictively indorsed but not so as to prohibit further transfer.

(Ss. 36, 76, 77, and 81.)

The difference between a negotiable instrument and a merely transferable one is of the utmost importance. A cheque may be rendered not negotiable. It may also be made not even transferable. (*e*)

A negotiable instrument is such an instrument that (1) the title to it passes by delivery, with or without indorsement, as the case may be, without the need for executing a transfer or assignment. (2) A *bonâ fide* holder for value, who has no notice, *i.e.*, no positive knowledge as opposed to the means of knowledge (*f*), of any defect in the title of the transferor to him of the instrument, is not prejudiced in his rights to and upon it by reason of the existence of such a defect.

The definition in Chapter II. of the "holder's" rights will further elucidate the point.

(*e*) It being especially important in the case of cheques, which are capable of being crossed "not negotiable" so as still to leave them freely transferable, to keep this distinction clear, we have in s. 2 departed from the language of the Act so as to avoid confusion.

(*f*) See *Raphael* v. *Bank of England*, 17 C. B. 161, and s. 90 defining good faith.

CHAPTER II.

PARTIES.

DRAWER—HOLDER—PAYEE—INDORSEE—INDORSEMENT —BANKER—CUSTOMER, CAPACITY OF PARTIES—PRINCIPAL AND AGENT.

THE DRAWER.

3.—The drawer of a cheque is the person who, by signing it, gives to the banker on whom it is drawn an unconditional order to pay it.

A crossing does not make the order to pay conditional, but only prescribes the mode of payment.

4.—The drawer of a cheque by drawing it engages that on due presentment it shall be paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided the requisite proceedings on dishonour be duly taken. (S. 55) (*a*).

That a holder may sue the indorser of a cheque

(*a*) Here and throughout the book the language of the Act is modified so as to be applicable to cheques alone.

is indisputable. See *Keene* v. *Beard*, 8 C. B. N. S. 372.

Notice of dishonour is rarely necessary to charge the drawer of a cheque, but it is well to give it. *Fruhauf* v. *Grosvenor*, 61 L. J. Q. B. 717.

5.—The drawer of a cheque is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. (S. 55 (1, b).)

"Holder in due course" and "payee" are defined in 8 and 9 respectively.

6.—A holder is the payee or indorsee of a cheque who is in possession of it, or the bearer thereof. (S. 2.)

7.—The rights and powers of the holder of a cheque are as follows:—

(1) He may sue on the cheque in his own name (*b*).

(2) Where he is a holder in due course, he holds the cheque free from any defect of title of prior parties, as well as from (*c*) mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the cheque (*d*).

(*b*) Whether a bearer or order cheque. *Ancona* v. *Marks*, 31 L. J. Ex. 163.

(*c*) Cf. *Lee* v. *Newsam*, D. & R. N. P. 50; a case merely illustrative of negotiability.

(*d*) Thus in *Lee* v. *Newsam* (*supra*) a tradesman, who took a cheque in exchange for goods and handed the purchaser the balance in cash, was entitled to recover, in the absence of negligence, though the cheque had been stolen from the payee.

(3) Where his title is defective, (a) if he negotiates the cheque to a holder in due course, that holder obtains a good and complete title to the cheque; and (b) if he obtains payment of the cheque, the person who pays him in due course gets a valid discharge for the cheque. (S. 38.)

"In due course"; a banker paying in contravention of a crossing of a cheque would not pay in due course.

8.—A holder in due course of a cheque is a holder who has taken a cheque complete and regular on the face of it under the following conditions:—

(a) That he became the holder of it before it was overdue without notice that it had been previously dishonoured by non-payment, if such was the fact.

(b) That he took the cheque in good faith and for value, and that at the time the cheque was negotiated to him he had no notice of any defect in the title of the person who negotiated it. (S. 29 (1).)

What is a defective title is considered in Chapters IV. and VII. There are two cases where a *bonâ fide* holder for value does not acquire the rights of a holder in due course:—(1) Where he takes a cheque bearing a forged or unauthorised signature not being an indorsement of a "bearer" cheque. (2) Where he takes a cheque crossed "not negotiable" from a person having no title or a defective title thereto.

9.—The payee of a cheque is the person to whom or to whose order the cheque is payable.

10.—" Bearer " means the person in possession of a cheque which is payable to bearer, whether it was so drawn or has become so by reason of the only or the last indorsement being an indorsement in blank. (Ss. 2 and 8.)

11.—Where a cheque is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. (S. 7 (1).)

12.—A cheque may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A cheque may also be made payable to the holder of an office for the time being. (S. 7 (2.))

Where the payee is a fictitious or non-existing person, the cheque may be treated as payable to bearer. (S. 7 (3).)

The important decisions on this sub-section, *Bank of England* v. *Vagliano*, 1891, A. C. 107, and *Clutton* v. *Attenborough*, 1897, A. C. 90, are referred to in Chapters III. and VII.

13.—A negotiable cheque may be payable either to order or to bearer. (S. 8 (2).)

A cheque is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. (S. 8 (3).)

A cheque is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. (S. 8 (4).)

Where a cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option. (S. 8 (5).)

14.—"Indorsement" means an indorsement completed by delivery. (S. 2.)

15.—Where a person signs a cheque otherwise than as drawer, he thereby incurs the liabilities of an indorser to a holder in due course. (S. 16.)

A person, whether a necessary party to a cheque or not, may under s. 16 indorse a cheque so as to negative or limit his liability upon it. Where A indorsed a cheque drawn by B, in order to induce C, the payee, to take it in lieu of cash, adding "sans recours," A was held not liable upon his indorsement which, being only written for the purpose of lending his name, and not to negotiate the cheque, was wholly valueless (*Wakefield* v. *Alexander*, 17 T. L. R. 217).

16.—The indorser of a cheque by indorsing it—

(a) Engages that on due presentment it shall be paid according to its tenor, and that if it be dishonoured

by non-payment he will compensate the holder or a subsequent indorser who is compelled to pay it, provided the requisite proceedings on dishonour be duly taken.

See *Keene* v. *Beard*, 8 C. B. N. S. 372.

Where the indorser is more substantial than the drawer, it would always be well to give him notice of dishonour. Countermand of payment, or the fact that the bankers had no effects of the drawer, would not excuse notice of dishonour as against the indorser.

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements.

(c) Is precluded from denying to his immediate or a subsequent indorsee that the cheque was at the time of his indorsement a valid and subsisting cheque, and that he had then a good title thereto. (S. 55.)

17.—The indorsee of a cheque is the person to whom a cheque is specially indorsed, or any person being the bearer of a cheque indorsed in blank, i.e., any person who makes a title to a cheque through an indorsement.

18.—An indorsement in blank specifies no indorsee, and a cheque so indorsed becomes payable to bearer. (S. 34 (1.))

A special indorsement specifies the person to whom or to whose order the cheque is payable. (S. 34 (2.))

When a cheque has been indorsed in blank any holder may convert the blank into a special indorsement by writing above the indorser's signature a direction to pay the cheque to the order of himself or some other person. (S. 34 (4).)

19.—A banker on whom a cheque is drawn is under an obligation to the drawer to pay it on due presentment, provided he has sufficient (*e*) funds of the drawer in his hands wherewith to meet it, and provided also that he has received no revocation of authority to pay it by notice of death or by countermand or otherwise.

20.—A customer of a banker may recover from the banker substantial damages, without proof of actual damage, if on due presentment his cheque is not paid and the banker had in his hands sufficient funds of such customer wherewith to meet it.

(*Rolin* v. *Steward*, 23 L. J. C. P. 148; *Cumming* v. *Shand*, 29 L. J. Ex. 129; and *Summers* v. *City Bank*, L. R. 9 C. P. 580; *King* v. *Brit. Linen Co.*, 36 S. L. R. 733.)

In *Rolin* v. *Steward* the Court held that the direction of Campbell, C.J., at the trial, that, in the absence of proof of actual damage, the jury were to give not nominal or excessive but temperate

(*e*) Whether he has or not may be difficult of proof. See generally *Bransby* v. *East London Bank*, 14 L. T. 403, a case not establishing any particular principle.

damages, was right. In the older case of *Marzetti* v. *Williams*, 1 B. & Ad. 415, it was held that an action would lie for dishonouring a cheque, but no direction was given on the question of the amount of damages, though Tenterden, C.J., expressed himself as if he thought they should be nominal, if no actual damage were proved. In *King* v. *British Linen Co.*, *supra*, the defendant bank was held liable for the damage to the plaintiff's financial reputation, they having dishonoured his cheque under these circumstances. He drew the cheque on 21st October. The bank wrote to him on the 22nd requesting him to pass no more cheques, as they intended to retain any money at his credit, pending the settlement of a claim by them. He replied that he drew the cheque in question prior to the receipt of their letter, and that if they dishonoured it his financial credit would be injured. The bank dishonoured the cheque on presentment through the clearing house, returning it marked, "Effects to be retained. Refer to Drawer."

It is a defence, where a banker dishonours the cheque of a customer, drawn by him as executor or trustee, to show an intention on the drawer's part to commit a breach of trust by misapplication of the money, and that the banker was cognizant of it. *Gray* v. *Johnston*, L. R. 3 H. L. 1.

Cumming v. *Shand*, 29 L. J. Ex. 129, is a case of interest to commercial men. The facts were as follows:—

The defendants, bankers, took up bills for the plaintiff, their customer, on the security of the produce of consignments, and by a course of dealing they permitted him to draw on his current account, without reference to the advances on the consignments. When he had 200*l.* to the credit of his current account, they dishonoured his cheque for 199*l.* 10*s.*, as they feared the security of the recent consignments was not sufficient to cover the amount of the acceptances taken up by them against the security. It was held that in the absence of express notice the defendants were not entitled to bring advances against consignments into the current account, and so to dishonour the cheque, and that it was properly left to the jury to say whether such notice had in fact been given.

A banker is under no obligation to let a customer overdraw, and if he does allow him to do so, he need give him no notice to put an end to the practice (*Cumming* v. *Shand*, *supra*, at p. 132). Another case on the effect of a course of practice is *Armfield* v. *London and Westminster Bank*, 1 Cab. & E. 170. The plaintiff sued the defendant bank for dishonouring his bill: proved that he had no funds sufficient to meet it, save by crediting as cash

cheques paid in by him but not cleared: proved that the bank had always credited such cheques to him as cash: held that the bank could not as against him set up their discretion whether or not to treat such cheques as cash. As to what does and what does not amount to an implied agreement to allow an overdraft, see *Ritchie* v. *Clydesdale Bank*, 13 Sess. Cas. 866, and *Fleming* v. *Bank of New Zealand*, 1900, A. C. 577, where it was held that the deposit with the bank by the plaintiff's agent of a store warrant, known to the bank to be subject to a pledge to the agent, was sufficient consideration for the bank's promise to honour the plaintiff's cheques drawn against the security of the deposit, in lieu of cash; it was also held that special damage from the dishonour of the cheques not having been alleged, evidence thereof, *i.e.*, of the loss of credit and custom from particular individuals, was inadmissible.

In *Twibell* v. *London Suburban Bank*, 1869, W. N. 127, it was held that when the plaintiff and his partner on opening their account stipulated with the defendant bank that no cheque drawn by one partner should be honoured unless initialled by the other partner, and the defendant bank in breach of this paid a cheque not so initialled by the plaintiff, the plaintiff could recover damages, and that the measure of damages was a moiety of the cheque so paid.

A banker should, in the absence of any directions, pay cheques in the order of presentment (*Kilsby* v. *Williams*, 5 B. & Ald. 815).

A paid cheque is the property of the drawer (*R.* v. *Watts*, 2 Den. C. C. 14), but the banker may retain it as a voucher till his account is settled (*Ib.* at p. 21, and cf. *Charles* v. *Blackwell*, 2 C. P. D. at p. 162).

It is uncertain whether such a legal duty is imposed on a banker to keep secret the state of his customer's account as to make him liable for disclosure of it, without justifiable cause, in the absence of proof of special damage. The question was considered in *Hardy* v. *Veasey*, L. R. 3 Ex. 107, where it was held that the question whether there was justifiable cause was properly left to the jury, who found that there was such a cause; the Court had consequently not to consider the main question. Other cases are *Foster* v. *Bank of London*, 3 F. & F. 214; and *Tassell* v. *Cooper*, 9 C. B. 509.

21.—A banker is not liable if he dishonour a cheque in any action by any person other than the drawer.

(See *Schroeder* v. *Central Bank of London*, 34 L. T. 735; and *Bellamy* v. *Marjoribanks*, 7 Ex. 389.)

This is not so in Scotland. By Scotch law presentment of a cheque gives the holder a lien on the drawer's balance at the bank.

22.—The relation of banker and customer is constituted where a person has funds in the hands of such banker, or is permitted by such banker to draw cheques upon him, or has an account with him, whether having at the time funds in such banker's hands or not (*f*), and (*g*) may be constituted where cheques are habitually lodged with a banker for presentation on behalf of the persons lodging them, so that when honoured the amount is credited and paid out to such person, whether with or without any profit to the banker for so presenting them.

The mere cashing across the counter of cheques, of which a person is the payee or holder, does not constitute such person the customer of the banker so cashing such cheques.

Nor does the collection of a single cheque for a stranger, whether in consideration of a commission or not.

This is the law as laid down upon the construction of s. 82 in *Matthews* v. *Williams, Brown, & Co.*, 10 T. L. R. 386; *Lacave* v. *Crédit Lyonnais*, 1897, 1 Q. B. 148; *G. W. Ry. Co.* v. *London and County Bank*, 1901, A. C. 414.

In *Kleinwort* v. *Comptoir d'Escompte*, 1894, 2 Q. B. 157, s. 82 was not discussed, but the collection was for a stranger.

(*f*) *Clarke* v. *London and County Bank*, 1897, 1 Q. B. 552.
(*g*) Lord Brampton, 1901, A. C. pp. 422, 423.

The authorities stop short of saying that a man must have an account at a bank to be a customer. See Lord Brampton, 1901, A. C. at p. 422; but Collins, J., 1897, 1 Q. B. at pp. 154, 155, very nearly goes as far as that.

23.—A banker who places a cheque to the credit of a particular customer as cash thereby becomes a holder in due course of such a cheque, and as such may sue all parties liable thereon, unless such cheque has been made not transferable under s. 8 (1), in which case the property therein does not pass to such banker.

Ex parte Richdale, 19 Ch. D. 409; *M'Lean* v. *Clydesdale Bank*, 9 A. C. 95; *National Bank* v. *Silke*, 1891, 1 Q. B. 435; *Royal Bank of Scotland* v. *Tottenham*, 1894, 2 Q. B. 715; *Bissell* v. *Fox*, 51 L. T. N. S. 663; *G. W. Ry. Co.* v. *London and County Bank*, 1901, A. C. 414; *Gordon* v. *London City and Midland Bank*, 18 T. L. R. 157.

If the view taken in *Ex parte Richdale* be correct, the banker becomes holder in due course whether the customer was overdrawn or not, and has no recourse against him, except on his indorsement.

The view taken by the Privy Council in *Gaden* v. *Newfoundland Savings Bank*, 1899, A. C. 281, was that in such case the banker took only as the customer's agent for collection.

Ex parte Richdale and *Royal Bank of Scotland*

v. *Tottenham* were cited in argument, but are not referred to in the judgment.

The facts were as follows:—

The appellant drew a cheque on the X. bank, whose servant initialled it. She then paid it into her deposit account at the respondents' savings bank, who credited it to her in her pass book. The X. bank failed and dishonoured the cheque. The appellant contended that the respondents' bank took her cheque as holders, so that the loss fell on them. The Privy Council decided that, in the absence of express agreement, the respondents must be held to have taken the cheque as agents for collection only. It was also held that the only effect of a drawee bank initialling a cheque is to certify that it has funds of the drawer's sufficient to meet it.

In *J. Bavins, junior* v. *London & S. W. Bank*, 5 Com. Cas. 1, it was said that the crediting a cheque as cash was not a payment of the amount to the customer, but was conditional on the cheque turning out all right, but the action was not between the banker and the customer who paid in the cheque, and so the observations were not a decision on the point.

In *Royal Bank of Scotland* v. *Tottenham* the bank permitted the customer to draw against a cheque for 250*l.* paid in by her. When it was dishonoured, she became a debtor to the bank for 137*l.*, the

amount which she drew against the cheque. Her cash balance, when she paid in the cheque, was practically nil. Here clearly the bank took the cheque as holders and could sue the drawer. In *M'Lean* v. *Clydesdale Bank* the cheque paid in by the customer was applied by the bank in reduction of his overdraft.

In *National Bank* v. *Silke* the cheque was credited to an overdrawn customer. This wiped out his overdraft and placed him in funds. He at once drew against the cheque, before it was presented, and when it was dishonoured his balance was very small. In deciding that here, as in M'Lean's case, the bank took as holders, Bowen, L.J., said (1891, 1 Q. B. at p. 439): "The case of *M'Lean* v. *Clydesdale Bank* makes it clear . . . that if a cheque is paid to a bank on a footing that the amount may be at once drawn upon, and it is drawn upon accordingly (*h*), the bank is a holder for value in due course."

Woodland v. *Fear*, 7 El. & Bl. 519, decided that where the Y. branch of a bank cashed a cheque drawn on the X. branch, in ignorance of the state of the drawer's account there, and at the date of Y. branch cashing it the X. branch had funds enough of the drawer's to meet it, but on presentment to the X. branch the cheque was dishonoured for lack of funds, the Y. branch could sue the person

(*h*) The matter is further considered in Chapter V.

to whom it gave cash for the cheque, as for money had and received, on the ground of failure of consideration. The branches were entitled to be regarded as separate parties. But where a party has an account at two branches of a bank, one showing a credit and the other a debt, the bank can combine the accounts and charge the credit account with the debt of the other. (*Garnett* v. *McKewan*, L. R. 8 Ex. 10.)

CAPACITY OF PARTIES.

24.—Capacity to incur liability as a party to a cheque is co-extensive with capacity to contract.

A corporation cannot make itself liable as drawer (?) or indorser of a cheque unless it is competent to do so by the law for the time being in force relating to corporations (?).

Where a cheque is drawn or indorsed by an infant or corporation (?) having no capacity or power to incur liability on a cheque, the drawing or indorsement entitles the holder to receive payment of the cheque and to enforce it against any other party thereto. (S. 22.)

As regards corporations, the liability of a corporation as drawer, at any rate, of a cheque would appear to be governed by whether the contract in respect of which it was given was enforceable against the corporation or not.

It is uncertain how far s. 22 (1) applies to cheques. A corporation may be competent to contract, but not to draw bills; but we cannot conceive it as having capacity to contract and yet not to draw cheques. Can it be liable to a holder of a cheque on the instrument, or is it liable only to its immediate obligee on the consideration? (See Chalmers, p. 64.)

The indorsement of a corporation by s. 22 (2) passes the property in a cheque, though from want of capacity the corporation may not be liable. (So, before the Act, *Smith* v. *Johnson*, 3 H. & N. 222, 27 L. J. Ex. 363.) Bankers may justifiably pay cheques drawn by companies, where, by the form of such cheques, the companies would not be liable as drawers, if the cheques had not been paid; provided that in the drawing of such cheques the requirements of the articles of association had apparently been complied with. This is following the rule in *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327 (*i*). (*Mahony* v. *East Holyford Co.*, L. R. 7 H. L. 869 and 884.)

S. 91 (2) of the Act provides: "In the case of a corporation, where, by this Act, any instrument or

(*i*) See also *Serrell* v. *Derbyshire Ry. Co.*, 9 C. B. 811, where a company was held not liable on cheques drawn by its directors, properly sealed, but not drawn by the directors as such, nor appearing on the face of them to have been drawn on behalf of the company.

writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

"But nothing in this section shall be construed as requiring any bill or note of a corporation to be under seal."

By the Infants' Relief Act, 37 & 38 Vict. c. 62, it is provided that—

S. 1.—"All contracts, whether by specialty or simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which any infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

S. 2.—"No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Thus an infant is not liable as drawer or indorser of a cheque, though he may be liable on the

consideration, as if he gave it for necessaries (*k*). And he may not be made bankrupt on a cheque or bill, though given as the price of necessaries. His liability is on the consideration, not on the instrument. (*In re Soltykoff*, 1891, 1 Q. B. 413.)

By s. 2 he would not be liable to a holder with notice on a cheque signed after majority in consideration of a debt contracted before majority, or in ratification of a promise to repay made when an infant. (*Smith* v. *King*, 1892, 2 Q. B. 543.) But if he gave a cheque after majority, he would be liable to a *holder in due course*, notwithstanding that he gave it in respect of a debt or promise contracted or made as an infant. (Cf. *Belfast Banking Co.* v. *Doherty*, 4 Ir. L. R. Q. B. D. 124.)

In *Ex parte Kibble*, L. R. 10 Ch. 373, an infant accepted a bill payable six months after date. It was thus payable three months after he came of age. On majority he ratified the transaction (*l*). He was held not to be liable to a holder in due course. We conclude if he had signed a cheque as an infant, post-dated so as to be payable after majority, and could have proved that he signed it

(*k*) "The person who has supplied an infant with necessaries can always sue on that contract for the price of what he has supplied." (Esher, M.R., 1891, 1 Q. B. at p. 415.)

(*l*) He let judgment on the bill go against him by default.

when an infant, he would be not liable upon it. An infant's indorsement, by s. 22 (2), passes the property in a cheque, though he be not liable upon it, and it is immaterial that the cheque is post-dated, though this point was raised in *Royal Bank of Scotland* v. *Tottenham*, before Wills, J. (1894, 2 Q. B. 715, on appeal only).

The effect of the Married Women's Property Act, 1893, s. 2, is to place married women on the same footing as single women in respect of liability on cheques, to which they became parties since the Act came into operation. Insanity is no defence to an action on a cheque by a holder in due course. The party sued must prove that the plaintiff had notice of it. (Cf. *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599.)

PRINCIPAL AND AGENT.

25.—No person is liable as drawer or indorser of a cheque who has not signed it as such; provided that—

(1) Where a person signs a cheque in a trade or assumed name, he is liable thereon as if he had signed it in his own name.

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm. (S. 23.)

A partner in a non-trading firm is not presumed

to have any authority to bind the firm by drawing bills in the firm's name.

A cheque post-dated a week was drawn by a partner in the name of a firm of solicitors as security for a private loan. Held it was a bill at seven days and did not bind the firm. (*Forster* v. *Mackreth*, 36 L. J. Ex. 94.)

As regards ordinary cheques in a firm's name, whether the firm were a trading firm or not, a holder could sue the firm, whether the cheques were drawn on its behalf or by a fraudulent partner for his own purposes. Only positive knowledge of the facts would disentitle a holder to recover.

See further Chalmers' notes to s. 23, and Byles, Chap. V.

26.—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority. (S. 25.)

Such a signature is in the principal's name, followed by "p.p.," or "*per pro.*," and the agent's name.

A bank paying on a forged or unauthorized indorsement "*per pro.*" may be protected by s. 60. (Cf. *Charles* v. *Blackwell*, 2 C. P. D. 151, at pp. 159, 160.)

If an agent draws a cheque "*per pro.*" in excess of his authority, his principal is not liable thereon to a person who has cashed the cheque in good faith, but he is liable to him for any proceeds that have come into his possession or been expended on his behalf. (*Reid* v. *Rigby*, 1894, 2 Q. B. 40.)

See also *National Bank of Scotland* v. *Dewhurst*, 1 Com. Cas. 318.

27.—Where a person signs a cheque as drawer or indorser and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. (S. 26 (1).)

It is further provided by s. 26 (2):

"In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

See Chalmers' notes for illustrative cases.

CHAPTER III.

ISSUE—NEGOTIATION—NON-TRANSFERABLE CHEQUES—RESTRICTIVE INDORSEMENT—NEGOTIATION WITHOUT INDORSEMENT—"ORDER" AND "BEARER"—TRANSFER BY DELIVERY WITHOUT INDORSEMENT—LOST CHEQUES.

28.—Issue means the first delivery of a cheque, complete in form, to a person who takes it as a holder. (S. 2.)

In *Clutton* v. *Attenborough*, 1897, A. C. 90, the plaintiff signed cheques payable to "G. B.," a fictitious person who was fraudulently represented by the plaintiff's clerk to be a real person, who had done work for the plaintiff. The clerk indorsed the cheques "G. B." and negotiated them for his own purposes. Held that the cheques were "issued" within s. 2. The case was treated as exactly covered by *Vagliano's Case*, 1891, A. C. 107.

The contention of Tindal Atkinson, Q.C., was that the cheques were never "issued" by Clutton, inasmuch as there was no "first delivery" of them to a "person who took them as holder," for the

fraudulent clerk P. could not be said to take them as holder; the delivery to P. was "conditional and for a special purpose only" (s. 21 (2) (b)), namely to pay the person G. B., supposed by Clutton to be his actual creditor; but this argument was unavailing against Attenborough, who was a holder in due course, and it appears to us that s. 21 (2) (b) in itself contains an answer to the argument, "But if the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed."

§ 28 must be construed with reference to s. 20 of the Act, set out as § 52 herein.

It seems from *Ingham* v. *Primrose*, 7 C. B. N. S. 82, that the drawer of a "bearer" cheque might be liable to a holder in due course, though the drawer had never issued it, it being stolen before issue. See Chalmers, p. 55.

29.—A cheque is negotiated when it is transferred from one person to another in such a way as to constitute the transferee the holder of the cheque. A cheque payable to bearer (*a*) is negotiated by delivery. A cheque payable to order is negotiated by the indorsement of the holder (*b*), completed by delivery.

(*a*) See § 13, Chapter II., for the explanation of "bearer" and "order."

(*b*) See *Marston* v. *Allen*, 8 M. & W. 494.

Where the holder of a cheque payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the cheque, and the transferee in addition acquires the right to have the indorsement of the transferor. (S. 31 (4).)

"Negotiate" as thus defined means simply "transfer," and a cheque may be "negotiated" which is "not negotiable." A negotiation only makes the transferee the holder; it does not make him the holder in due course.

It was settled in *Whistler* v. *Forster*, 14 C. B. N. S. 248, that a *bonâ fide* transferee for value, who did not see that his transferor indorsed the cheque, was not entitled to recover against a party from whom the transferor had obtained the cheque by fraud.

A simple signature on a cheque is a sufficient indorsement. An indorsement must be of the entire cheque, *i.e.*, of the whole sum payable, or else it does not operate as a negotiation of the cheque. (S. 32.)

The distinction between special indorsement and indorsement in blank has been explained in § 18.

By s. 37 of the Act it is provided that "where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may,

subject to the provisions of this Act, reissue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable." (See *Jenkins* v. *Comber*, 1898, 2 Q. B. 168.)

This section, except where it mentions renegotiation to an acceptor, is applicable to cheques.

30.—Where a cheque contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable. (S. 8 (1).)

It was assumed in *National Bank* v. *Silke*, 1891, 1 Q. B. 435, that a cheque might be made not transferable under this sub-section, read with s. 73.

That case decided that a crossing "Account of J. F. M., National Bank, Dublin," does not amount to "words prohibiting transfer"; consequently J. F. M.'s banker, as holder in due course, could sue the drawer, although as between J. F. M. and the drawer the consideration had wholly failed. The cheque was an "order" one, and Lindley and Fry, L.JJ., doubted if "order" or "bearer" cheques could be made not transferable under s. 8 (1). Fry, L.J., at p. 439 says that the section divides bills into three classes: bills not negotiable, bills payable to order, and bills payable to bearer. The latter two classes must always therefore be

"negotiable," in the sense of "transferable." The word "negotiable" in this section and in the marginal note is used to mean transferable. A bill may be restrictively indorsed so as to be not "negotiable" in the more technical sense and yet be transferable. (S. 36 (2).) So also a cheque crossed "not negotiable" is freely transferable. This confusion of language, which occurs not only in s. 8 but elsewhere in the Act, led Lindley, L.J., to doubt whether a cheque could be made "not negotiable" under s. 8 or otherwise than under ss. 76—82. In other words, he doubted whether a cheque could be made "not *transferable*" at all. It is submitted that this doubt was not well founded. S. 73 leaves s. 8 applicable to cheques. S. 81 provides for making a cheque "negotiable subject to equities," if we may use a phrase intelligible to all lawyers, but not for making a cheque "not negotiable" in the sense of "not transferable." An order on the face of the cheque similar to that on the back of a bill restrictively indorsed would have the effect of making it not transferable. Deleting the words "or order" and writing "Pay K. against cheque" (*i.e.*, K.'s cheque delivered by way of security) have no effect to restrict transfer or negotiation within s. 8, and do not amount to a "condition" within s. 3 (*Glen* v. *Semple*, 3 F. Sess. Cas. 1134).

31.—When a cheque is payable to the order of two or more payees or indorsees, who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. (S. 32 (3).)

If a cheque is payable to "C. and D. or to the order of either of them," the indorsement of either is thereby rendered sufficient. (Cf. *Watson* v. *Evans*, 32 L. J. Ex. 137, a case on a note payable to three payees.)

32.—Where in a cheque payable to order the payee or indorsee is wrongly designated or his name is mis-spelt, he may indorse the cheque as therein described, adding, if he think fit, his proper signature. (S. 32 (4).)

This is useful, as it would often be very inconvenient to return the cheque to drawer.

33.—An indorsement is restrictive which prohibits the further negotiation of the cheque, or which expresses that it is a mere authority to deal with the cheque as thereby directed, and not to transfer the ownership thereof, as, for example, if a cheque be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection." (S. 35 (1).)

See Chalmers' notes to this section for further illustrations.

34.—A restrictive indorsement gives the indorse

the right to receive payment of the cheque, and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorser unless it expressly authorizes him to do so. (S. 35 (2).)

The reader should distinguish the effects of restrictive indorsement and crossing "not negotiable." A cheque crossed "not negotiable" is still transferable, but a cheque restrictively indorsed is not even transferable, unless the indorsement expressly authorizes further transfer.

35.—Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the cheque with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement. (S. 35 (3).)

I.e., it becomes "not negotiable."

36.—Where a holder of a cheque payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

A transferor by delivery is not liable on the instrument.

A transferor by delivery who negotiates a cheque thereby warrants to his immediate transferee, being a holder for value, that the cheque is what it purports to be; that he has a right to transfer it; and that

at the time of transfer he is not aware of any fact which renders it valueless. (S. 58.)

See for examples *Jones* v. *Ryde*, 5 Taunt. 488, and *Gurney* v. *Womersley*, 24 L. J. Q. B. 46.

37.—The contract entered into by the drawer and indorser of a cheque, in drawing and indorsing, is incomplete and revocable until delivery of the instrument in order to give effect thereto.

As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) In order to be effectual, must be made either by or under the authority of the party drawing, or indorsing, as the case may be.

(b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring property in the cheque.

But if the cheque be in the hands of a holder in due course, a valid delivery of the cheque by all parties prior to him, so as to make them liable to him, is conclusively presumed.

Where a cheque is no longer in possession of a party who has signed it as drawer or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved. (S. 21.)

In *Baxendale* v. *Bennett*, 3 Q. B. D. 525, an

incomplete bill was stolen after B. had accepted it in blank. B. had sent it to C. for C. to sign as drawer. C. returned it unsigned, and B. put the blank acceptance into his drawer, whence it was stolen, filled up and negotiated to the plaintiff. B. was held not liable upon his acceptance. His name was not put upon a bill, but only upon an inchoate instrument, and, as we shall see, "in order that any such instrument, when completed, may be enforceable against any person who became a party thereto prior to its completion, it must be filled up . . . strictly in accordance with the authority given." (§ 52, embodying s. 20 of the Act.) The instrument in this case was not so filled up, and B. was not liable.

Ingham v. *Primrose*, 7 C. B. N. S. 82, was a case where an acceptor of a bill which had a drawer's name (Murgatroyd's) thereto, and was a complete bill, tore it up, as the drawer told him he could not get it discounted. The drawer, in his presence, picked it up and subsequently pasted it together and negotiated it, its appearance not suggesting cancellation. The acceptor was held liable to a holder in due course. He had put his name to it as a complete instrument.

Chalmers suggests from the dictum of Williams, J., at p. 85, that if A. drew a cheque payable to bearer, intending to pay it to X., and it was stolen

from his desk before he issued it, he would be liable on it to a holder in due course (p. 55).

On the wording of s. 21 (2) (b), this view seems correct.

Baxendale v. *Bennett*, and *Ingham* v. *Primrose*, are reconcilable decisions.

In *Baxendale* v. *Bennett* the instrument was stolen before it was complete.

It was never "delivered by the signer in order that it might be converted into a bill." In *Ingham* v. *Primrose* the bill was complete when it was torn up, and so "a valid delivery" by the drawer was "conclusively presumed" so as to make him liable.

This, it is submitted, is the real distinction between the two cases. Bramwell, L.J., in *Baxendale* v. *Bennett* points out that in *Ingham* v. *Primrose* the instrument was not stolen, and in the case before him it was. In *Ingham* v. *Primrose* "the defendant voluntarily parted with the instrument." Here it was only obtained from him by the commission of a crime (p. 530). Brett, J., simply does not agree with *Ingham* v. *Primrose* (pp. 532, 533). Neither judge notices that the bill in *Ingham* v. *Primrose* was a complete bill, with a drawer's signature, while that in *Baxendale* v. *Bennett* was an inchoate instrument, not drawn at all! (Cf. *Stoessiger* v. *South Eastern Railway*, 3 E. & B. 549.)

The case of *Clutton* v. *Attenborough*, 1897, A. C. 90, is directly in point. The plaintiff drew cheques to the order of G. B., a fictitious person, represented by his clerk to be the plaintiff's creditor. He gave them to the clerk to pay to G. B. It was held that he could not set up against a holder in due course that there had been no "first delivery" of the cheques to any person who took them as holder.

S. 21 (3) may be illustrated by *Marston* v. *Allen*, 8 M. & W. 494. It was there held that a party sued on a bill may show that the indorser never delivered it so as to negotiate it, for there must be delivery and indorsement of a bill payable to order (s. 31 (3)). "A valid and unconditional delivery is presumed until the contrary is proved" (s. 21 (3)). When the contrary is proved, the burden of proving himself a holder in due course is shifted to the person relying on the instrument. It was held that evidence ought to have been admitted that there was no delivery of the bill in question so as to negotiate it, and that the plaintiff was aware of it, for on such evidence the jury would have found for the defendant. A jury may infer a delivery by A. to B. where A. has delivered a cheque to C. to get it discounted, and C. has not disclosed B.'s identity to A. (*Samuel* v. *Green*, 10 Q. B. 262.)

LOST CHEQUES.

S. 69 of the Act provides as follows :—

"Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

"If the drawer, on request as aforesaid, refuses to give such duplicate bill (*d*), he may be compelled to do so."

The words "before it is overdue" must, we think, be taken not to apply to cheques. S. 74 provides what is the position of the drawer when a cheque is overdue. He is not discharged, like the drawer of a bill, but only to the extent to which he is a creditor of the bank to a larger amount than he would have been had the cheque been presented within a reasonable time (see s. 45 (2)).

S. 69 gives no power to obtain an indorsement over again, or, in the case of a bill, the acceptance.

S. 70 of the Act provides that—

"In any action or proceeding upon a bill, the Court or a judge may order that the loss of the

(*d*) See *Rhodes* v. *Morse*, 14 Jur. 800 ; *Taylor* v. *Scrivens*, 1 Beav. 571.

instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question."

In *Pennington* v. *Crossley & Sons, Ltd.*, 13 T. L. R. 573, plaintiff sued for 509*l.* as the price of wool sold and delivered to defendant. Defendant gave evidence that for twenty years he had always sent cheques per post to the plaintiff. On this occasion he had sent a cheque with a blank receipt form to be filled up by the plaintiff. The cheque, which was crossed, was stolen in the post, the thief forging plaintiff's indorsement and getting the cheque collected. The defendant contended that the course of business showed that payment was to be made by posting cheques, and that posting was equivalent to payment. The Court of Appeal, overruling Grantham, J., declined to take this view. Judgment for plaintiff.

Where A. delivered a cheque to B., and it was lost in transmission to C.'s agent, and A. promised to give C. another, it was held C. could not enforce the promise for want of consideration, and had no right to demand another cheque in the absence of sufficient proof that B. was his agent. (*Johns* v. *Mason*, 20 L. J. Ch. 305.)

CHAPTER IV.

CONSIDERATION—ANTECEDENT DEBT OR LIABILITY—A HOLDER DEEMED TO BE FOR VALUE—BURDEN OF PROOF—FRAUD, ILLEGALITY AND DURESS—SUING ON THE CONSIDERATION.

38.—Valuable consideration for a cheque may be constituted by (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. (S. 27 (1).)

Currie v. *Misa*, L. R. 10 Ex. 153—Ex. Ch.; *McLean* v. *Clydesdale Bank*, 9 A. C. 95.

39.—Where value has at any time been given for a cheque, the holder is to be deemed to be a holder for value as regards all parties to the cheque who became parties prior to such time (*a*). (S. 27 (2).)

40.—Where the holder of a cheque has a lien on it, arising either from contract or by implication of law,

(*a*) *I.e.*, it lies on any prior parties who may be sued to show the holder was not a holder for value, nor a transferee from one. Both averments must be proved. See *Bosanquet* v. *Corser*, 8 M. & W. 142, at p. 144; *Watson* v. *Russell*, 5 B. & S. 968.

he is deemed to be a holder for value to the extent of the sum for which he has a lien. (S. 27 (3).)

41.—Every party whose signature appears on a cheque is primâ facie deemed to have become a party thereto for value. (S. 30 (1).)

42.—A banker becomes a holder for value of a cheque by placing the amount of the cheque, before it is cleared, to the credit of a customer, who has handed him such cheque to be placed to his credit, whether the cheque be payable to "order" or to "bearer," and whether the said customer's account be overdrawn at the time of such placing to his credit or not.

This is the effect of *Ex parte Richdale*, 19 Ch. D. 409, confirmed by *Royal Bank of Scotland* v. *Tottenham*, 1894, 2 Q. B. 715; and other cases; but in *Gaden* v. *Newfoundland Savings Bank*, 1899, A. C. 281, the Privy Council held that when the account was not overdrawn the bank took a bearer cheque as agent for collection only. But the proposition of law contained in § 42 is hardly open to question, in view of the stream of authorities supporting it.

The matter will be recurred to in treating of s. 82 of the Act, in Chapter V.

43.—Every holder of a cheque is primâ facie deemed to be a holder in due course, but if, in an action on

a cheque, it is admitted or proved that the issue or subsequent negotiation of the cheque is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the cheque. (S. 30 (2).)

See definition of "holder in due course" in s. 8, Chapter II.

The words "or proved" merely mean "if there is evidence to go to a jury." (*Tatam* v. *Haslar*, 23 Q. B. D. 345, at pp. 348, 349.)

44.—A holder (whether for value or not) who derives his title to a cheque through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of a holder in due course as regards all parties to the cheque prior to that holder. (S. 29 (3).)

See *May* v. *Chapman*, 16 M. & W. 355, where a defence that A. had obtained a bill by fraud from the defendant and had indorsed it to B., who indorsed it to the plaintiff, and that the plaintiff was aware of A.'s fraud, was held bad, as it was not also pleaded that B. was aware of the fraud.

The following rules as to impeachment of consideration are stated and illustrated in Chalmers, pp. 95—101 :—

1. Any defence available against an immediate party is available against a remote party who is in privity with such immediate party.

2. Mere absence of consideration, total or partial, is a defence against an immediate party or a remote party who is not a holder for value, but it is not a defence against a remote party who is a holder for value.

3. Total failure of consideration is a defence against an immediate party, but it is not a defence against a remote party who is a holder in due course.

4. Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained or liquidated amount, but not otherwise. It is not a defence against a remote party who is a holder for value.

5. Fraud is a defence against an immediate party and against a remote party who is not a holder in due course.

6. Illegality of consideration, total or partial, is a defence against an immediate party, but not against a holder in due course.

It may here be observed that in many cases a party may sue on the consideration where he cannot sue on the instrument, *e.g.*, when an infant has given a bill or cheque for necessaries. (Cf. *In re Soltykoff*, 1891, 1 Q. B. 413.)

The burden of proving consideration lies on him, instead of consideration being presumed, as if he sued on the instrument.

Moreover, his rights as plaintiff are personal, not transferable, like his rights on the instrument.

The law as to cheques given in respect of bets is as follows:—

(1) If the bet was illegal under 5 & 6 Will. IV. c. 41, the bad consideration is a good defence as between the parties. The onus is on a third party suing to show that he was a holder in due course. A cheque given to secure money advanced for payment of racing bets is not deemed to have been given for an illegal consideration within that statute. (*Ex parte Pyke*, 47 L. J. Bk. 100.)

(2) If the bet was void under 8 & 9 Vict. c. 109, s. 18, a holder need not show that he was a holder in due course. The presumption of valuable consideration is still in his favour (*Fitch* v. *Jones*, 5 El. & Bl. 238), and proof that the holder had notice of the consideration as between the parties does not disentitle him to recover. (*Lilley* v. *Rankin*, 56 L. J. Q. B. 248.) Whereas if the bet were illegal under 5 & 6 Will. IV. c. 41, the knowledge of the holder as to the consideration as between the parties disentitles him to recover. (*Woolf* v. *Hamilton*, 1898, 2 Q. B. 337—C. A.) This case decides that betting on horse racing is

"illegal." *Beeston* v. *Beeston*, 1 Ex. Div. 13, was not cited. There it was held that A. could sue B. on his cheque in these circumstances:—

A. paid B. money to back certain horses. The horses won, and B. gave A. the cheque the subject-matter of the action. It was held that the transaction was not illegal within 5 & 6 Will. IV. c. 41, and as the action was on the cheque, and not to recover a bet under 8 & 9 Vict. c. 109, the plaintiff could recover.

But in *Lynn* v. *Bell*, 10 Ir. R. C. L. 487, the plaintiff was held to be entitled to recover the amounts of certain bearer cheques given in respect of bets on horses. It was held—(1) horse racing was a game within 5 & 6 Will. IV. c. 41; (2) the cheques, paid by the plaintiff's banker, were paid by the plaintiff within s. 2, and he could recover their amount; (3) the defendant could not set off a bearer cheque given by him to the plaintiff in respect of a bet on a horse, drawn by C., as such cheque was "paid" by C., and not by the defendant, within s. 2, and the defendant could not therefore recover its amount.

The Gaming Act of 1892 does not appear to affect the law relating to securities given in respect of gaming transactions.

CHAPTER V.

CROSSED CHEQUES AND CHEQUES MARKED "NOT NEGOTIABLE."

45.—It is provided by s. 76 of the Act that—

(1) Where a cheque bears across its face an addition of (a) the words "and company," or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable;" or (b) two parallel transverse lines simply, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

46.—It is provided by s. 77 of the Act that—

(1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally, the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

47.—It is provided by s. 78 of the Act that a crossing authorized by this Act is a material part of the cheque (*a*); it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

A drawer may "open" a crossed cheque by writing "pay cash" and signing the alteration.

48.—It is provided by s. 79 of the Act that—

(1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof (*a*).

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays

(*a*) *Carlon* v. *Ireland*, 5 El. & Bl. 765, and *Bellamy* v. *Marjoribanks*, 7 Exch. 389, are now of no authority on the effect of double crossing, or striking out of crossing.

a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Smith v. *Union Bank of London*, 45 L. J. Q. B. 149, must not be now read as authority for the proposition that a banker, paying in contravention of the crossing, is liable to the drawer but not to the payee. In that case a payee specially crossed a cheque to his bank, having indorsed it. It was stolen, and a *bonâ fide* holder obtained payment of it, in contravention of the crossing, from the defendant bank. Held the defendant bank was not liable to the plaintiff. It was pointed out that the cheque, which was negotiable, had passed to the holder for value, and so the plaintiff had no property in it. On this ground the decision is still supportable, as the liability of the banker is only to the "true owner." See the case discussed in the Introduction.

(*b*) **Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the**

(*b*) Cf. *Simmons* v. *Taylor*, 4 C. B. N. S. 463, before the Act.

banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

A banker has no right to debit the drawer's account with a cheque paid by the banker to a person not entitled to receive payment, in contravention of the crossing. The person receiving such payment is not liable if the property in the cheque has passed to him. In *Bobbett* v. *Pinkett*, 1 Ex. Div. 368, a cheque payable to A. or order, and crossed to the X. Bank, was stolen by a thief, who *forged* A.'s indorsement and negotiated the cheque to B., who gave value, and paid the cheque into his account at the Y. Bank, who collected it, the bank on which it was drawn disregarding the special crossing. It was held that the drawer, who allowed his bank to debit him with the amount, could recover the amount from B. No property in the cheque passed to B. Had the cheque been a bearer cheque, or been stolen after being indorsed in blank, there would, says Chalmers, be no remedy

apart from s. 79, but it is difficult to see how s. 79 could be relied on, as in that case B. himself would have become the "true owner" within sub-s. (2), which gives the "true owner" of a cheque a remedy against a banker, who pays in contravention of the crossing. The section re-enacts provisions of the Crossed Cheques Act of 1876. That Act was passed soon after *Smith* v. *Union Bank*, 1 Q. B. D. 31, was decided, and was passed to remedy the supposed consequences of that decision. The present Act is one to codify the law, and not, according to the title, to amend it.

In *Smith* v. *Union Bank* the plaintiff had lost a cheque of which he was payee. The thief negotiated it to a holder in due course, who obtained payment from the bank, in disregard of the crossing. One answer to the plaintiff's action was that he no longer had any property in the cheque. Could that answer be made to-day? Could a bank rely in such a case on the words "true owner," and contend that not the plaintiff, whether payee or drawer, but the holder in due course, was the "true owner" within s. 79 (2)?

Chalmers, p. 258, appears to think that the section would give a remedy in such a case—to whom he does not say—but he is discussing *Bobbett* v. *Pinkett*, 1 Ex. Div. 368, and he says that, but for the forged indorsement, the only

remedy would have been against the drawer's bank under this section. Yet had the cheque there been payable to bearer, as in the hypothetical case he puts, the person who obtained payment from the drawer's bank, and not the payee or the drawer, would have been the "true owner."

Unless a man can be a "true owner" within s. 79 who has no longer any rights to or upon the instrument of which he claims such ownership, I do not see how a person, who has lost property in a cheque, is enabled to maintain an action on s. 79 (2) against the drawee bank.

What the Crossed Cheques Act did do to remedy the dangers arising from the decision in *Smith's Case* was this—it introduced the "not negotiable" crossing, the adoption of which would prevent property passing where a cheque was stolen and then negotiated for value to an innocent holder.

Thus a payment to a holder of such a cheque so stolen, made in contravention of the crossing, could never be a payment to the "true owner," ownership remaining in the drawer or the original payee, or whoever might lawfully have become entitled to the cheque, and such a person could thus, as true owner, fix with liability the bank making such irregular payment. But if a cheque is crossed without these words, it is difficult to see how the provisions of the Crossed Cheques Act, re-enacted

in s. 79 of the present Act, affect the decision in *Smith* v. *Union Bank*, so far as it proceeded on the ground that the plaintiff was no longer the owner of the cheque.

It is the practice of some banks, where a crossed cheque has been dishonoured at the clearing-house, to pay cash on a subsequent presentment across the counter, if there are then funds to meet it. Such a practice would not appear to be sanctioned by the Act, and a bank would act at its peril.

49.—It is provided by s. 80 of the Act that where a banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

50.—It is provided by s. 81 of the Act that where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have, and shall not be capable of giving, a better title to the cheques than that which the person from whom he took it had.

The effect of crossing a cheque "not negotiable" (*c*) is "to put it much on the same footing as an over-due bill" (Chalmers), or, as we would suggest, on the same footing as a bill restrictively indorsed, but not so as to prohibit further transfer. (Cf. s. 35 (3).) The recent case of *Great Western Railway Co.* v. *London and County Bank*, 1901, A. C. p. 414, is considered in discussing the next section.

The advantage of adding the words "not negotiable," which, the general reader should observe, a holder as well as a drawer may add, is that, while the cheque is still transferable, it is only transferable as is a postal order or any other transferable chose in action. A *bonâ fide* holder for value takes such a cheque subject to personal defences available to prior parties between themselves; *e.g.*, a cheque so crossed was drawn in favour of a firm, and was fraudulently indorsed by one partner to A., who cashed it. Held the other partner could recover the amount from A. (*Fisher* v. *Roberts*, 6 T. L. R. 354.)

To cite the words of Halsbury, L.C., in the recent case of *The Great Western Railway Co.* v. *London and County Banking Co.*, 1901, A. C. p. 414, 17 T. L. R. p. 700:—

"It is very important that every one should know that people who take a cheque which is

(*c*) A cheque crossed without these words is still negotiable. (*Smith* v. *Union Bank*, 45 L. J. Q. B. 149.)

marked 'not negotiable,' and treat it as a negotiable security, must recognize the fact that, if they do so, they take the risk of the person for whom they negotiate it having no title to it."

In *Pennington* v. *Crossley*, 13 T. L. R. 573, the addition of the words "not negotiable" would have, in all probability, prevented the loss incurred by the defendants.

51.—It is provided by s. 82 of the Act, that—

Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner by reason only of having received such payment.

It seems clear that the protection afforded by this section extends to crossed cheques which are marked "not negotiable." In *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7, on the corresponding section, s. 12, of the Crossed Cheques Act (39 & 40 Vict. c. 81), which united the present ss. 81 and 82, it was contended that the protection only extended to cheques so crossed, but no such argument could be raised on the present Act.

It is to be observed :—

(1) The section only protects the banker if he receives payment without negligence.

Accordingly a banker who received payment of several cheques paid into his account by a customer, who was known to the banker to be only a commercial traveller, and who indorsed the cheques in the payee's, his principal's, name "*per pro.*," was held to be not entitled to rely on s. 82, it appearing that he made no inquiry from his customer's principal whether the customer had any authority to indorse the cheques. (*Bissell* v. *Fox*, 51 L. T. R. 663, 53 L. T. R. 193.)

And in *Hannan's Lake View Central, Ltd.* v. *Armstrong & Co.*, 5 Com. Cas. 188, Kennedy, J., held that where the defendant bank collected cheques drawn in favour of the plaintiff company or order, and indorsed by the secretary of the plaintiff company, "Hannan's Lake View Central, Ltd., H. Montgomery, Secretary," and paid by him into his private account at the defendants' bank, the plaintiff company having, as the defendants knew, a separate account at another bank in London, they (the defendant bank) had not acted "without negligence," and could not rely on s. 82. See *J. Bavins, Junr.* v. *London and South-Western Bank*, 5 Com. Cas.

(2) The section only extends to the ordinary case of collecting from the banker on whom the cheque is drawn. It would not protect a banker who collected from the drawer of a cheque, dishonoured

on presentment for payment, as debt collector for the payee or a subsequent indorsee. (See *Gillespie* v. *International Bank of London*, 4 T. L. R. 322, a peculiar case.)

(3) The section only extends to receiving for a customer.

A banker who received payment for a casual stranger is, of course, not protected. (*Matthews* v. *Williams, Brown & Co.*, 10 T. L. R. 386; *Lacave & Co.* v. *Crédit Lyonnais*, 1897, 1 Q. B. 148.) The collection was apparently for a stranger in *Kleinwort* v. *Comptoir d'Escompte*, 1894, 2 Q. B. 157; but this section was not discussed.

In *Lacave* v. *Crédit Lyonnais* (*supra*) the Paris branch of the defendant bank collected a cheque from the London branch for a stranger, and it was held that the presentation of the cheque to the London by the Paris branch was a conversion of the cheque in London by the Paris branch. Collins, J., in his judgment does not quite go so far as to say that a man, to be a customer, must have an account. He says: "Protection is only given to a bank, which does collect for a customer in the real sense, if he is a person who has an account at the bank; at all events, if he is a person whose relations are much nearer and closer than those of Ponce in this case."

And Lord Brampton, 1901, A. C. at p. 422,

says: "It is not necessary to say that the keeping of an ordinary banking account is necessary to constitute a person a customer."

In *Kleinwort* v. *Comptoir d'Escompte* (*supra*) the payee of a crossed cheque posted it to the plaintiffs, having specially indorsed it to them. It was stolen in transit, and a stranger, having obliterated the plaintiffs' name as indorsees, and substituted a special indorsement to himself, presented the cheque at the defendants' bank in Paris.

They collected it for him through their London agent and handed him the money. Cave, J., found as a fact that the obliteration occurred after the posting. He held that delivery to the post office was delivery to the plaintiffs, who obtained a good title by the indorsement to them, and that the conversion took place in London, when the defendants received the money, and so the case was governed by English law and the defendants were liable.

A man who, having no account, has habitually got crossed cheques, payable to his order, cashed for him across the counter, the bank subsequently collecting the amount for themselves, is not "a customer," nor is the payment received for him, but for the bank itself as holder in due course.

This is the decision of the House of Lords in *Great Western Railway Co.* v. *London and County Bank*, 1901, A. C. 414, 17 T. L. R. 700.

The facts were as follows:—

H. obtained a cheque from the appellants by a false pretence. It was payable to H. or order, and crossed generally with the words "not negotiable." The respondent bank gave H. cash for the cheque, as they had done on previous occasions, and collected the cheque. H. had no account at the respondent bank.

The House of Lords held (1) that H. was not a customer; (2) that in any case, as the bank gave him cash for the cheque, the bank took it as a holder, and not as agent for collection, and so the bank received payment for itself; and (3) that the bank could not, therefore, rely on s. 82 in an action by the appellant company for money had and received, or for damages for conversion of the cheque, and that the bank had no title as holder, inasmuch as the cheque was marked "not negotiable" and passed to the bank subject to the defect of title of H., the transferor.

The Court of Appeal, 1900, 2 Q. B. 464, had regarded H. as a customer, and had (*dub.* Vaughan Williams, L.J.) regarded the bank as agent for collection, not as holder of the cheque.

Lord Brampton, 1901, A. C. at p. 422, suggested that the collection of a cheque marked "not negotiable," without inquiry, might, in the circumstances, have been negligence, which in

itself would have disabled the bank from relying on s. 82. In *Bissell* v. *Fox*, 51 L. T. R. 663, Denman, J., clearly took the view that where a cheque is at once placed to the customer's credit as cash the banker subsequently collects it for himself, and not for the customer. But the Court of Appeal in *Great Western Railway Co.* v. *London and County Bank*, 1900, A. C., thought it possible to regard a bank cashing a cheque for a customer, not as purchasing it, but as advancing on the security of it.

In *Clarke* v. *London and County Bank*, 1897, 1 Q. B. 552, the cheque was paid in by a customer for collection, and was only credited to his account when paid, and this was the *ratio decidendi*. The fact that the customer was overdrawn and was allowed to draw a further sum against the cheque when paid in, before it was cleared, and that the bank applied part of the sum received on collection in repayment of the overdraft, did not deprive the bank of the protection of s. 82.

In the very recent cases of *Gordon* v. *London City and Midland Bank* and *Gordon* v. *Capital and Counties Bank*, 1903, A. C. 240, the question was finally decided in what capacity a banker receives payment of a crossed cheque already credited by him to his customer as cash.

In *Gordon* v. *City and Midland Bank* the facts

were as follows :—Gordon's clerk, Jones, received cheques payable in most cases to Gordon or order. He took the cheques in dispute to the defendants' branch, where he had an account, having in the majority of instances first crossed them; he forged his employer's signature to such of the cheques as were payable to "order," and at the defendants' request indorsed his own name to all the cheques to give them his personal security in the event of any being refused payment.

The bank credited him with the amounts in his account, and he drew on his account when he required money: but for these cheques his account would have been in debt. The plaintiff sued as true owner for the conversion of the cheques.

The cheques included—(1) "order" cheques and one "bearer" cheque drawn on other banks than the defendants' and paid in uncrossed, being crossed by the defendants for collection; (2) "order" cheques drawn on other banks and paid in crossed, including some crossed "not negotiable," and "bearer" cheques drawn on other banks and paid in crossed; (3) cheques drawn on other branches of the defendants' bank payable to order and paid in crossed; (4) bankers' drafts, addressed to the defendants' head office, drawn by a country manager and paid in uncrossed.

The appeal to the House of Lords was confined,

so far as concerns what were strictly cheques, to the order cheques in classes (1) and (2), and the view taken in the Court of Appeal was upheld—viz., that a crediting of cheques as cash before clearance renders their subsequent collection one on behalf of the collecting banker, and not his customer, within s. 82; secondly, that s. 82 does not extend to cheques paid in uncrossed, and subsequently crossed by the banker himself. On the first point Lord Lindley said: "Now, when the cheque was paid to the bank, the bank received the payment for itself rather than for Jones. . . . The moment a bank places money to its customer's credit, the customer is entitled to draw upon it. It appears to me impossible to say that under these circumstances the bank received payment for their customer Jones."

On the second point the judgment of the Court of Appeal was simply affirmed.

On the question of the banker's drafts the decision below was varied. It was held that although not bills within the Act, nor documents to which the Act was extended by s. 17 of the Revenue Act, 1883, inasmuch as they were not issued by a customer to a banker, they were drafts on a banker payable on demand within s. 19 of 16 & 17 Vict. c. 59, and the bank was protected in paying them on forged indorsements. The judgment of

Bigham, J., in *Brown & Co.* v. *National Bank of India*, 18 T. L. R. 669, in which he reluctantly followed the Court of Appeal on this point, is thus overruled.

In the second case the facts were identical, except that the defendant bank did not require the clerk's indorsement of the cheques paid in, and the judgment the same.

The effect of this decision is to confirm the view that the crediting of a cheque as cash before clearance deprives a banker of the protection of s. 82.

The other decisions in support of this view are collected in the notes to § 23, and, in spite of some contrary authority, it must be accepted as the law, although the alternative view, expressed in *Gaden* v. *Newfoundland Savings Bank*, 1899, A. C. 281, and *J. Bavins, Junr.* v. *London and South-Western Bank*, 5 Com. Cas. 1, that such a crediting is conditional only, seems more consonant to common sense and the opinions of bankers.

In *Tate* v. *Wilts and Dorset Bank*, Journ. XX. p. 376, the Divisional Court held that a banker was protected who collected a cheque for a non-customer, who, having obtained it by false pretences, had a voidable title to it.

But a similar contention by Lawrence, K.C., on behalf of the defendant bank in *Great Western*

Railway Co. v. *London and County Bank*, 1901, A. C. p. 414, was quite unsuccessful.

A person who has a voidable title has a "defective title," and if he is not a customer, the banker who collects a cheque for him cannot be protected, as s. 82 provides that he is only to be protected if the person with a defective title, for whom he collects, is a customer.

A crossing "Account of J. F. M., National Bank, Dublin," does not restrict the transfer of the cheque within the meaning of s. 8. (*National Bank* v. *Silke*, 1891, 1 Q. B. 435.) It has no special efficacy.

In view of s. 73, there appears no reason to suppose that a cheque cannot be made "not transferable" under s. 8 (1), as well as "not negotiable" under ss. 77 (4) and 81. The judgments of Fry and Lindley, L.JJ., in *Silke's Case*, and the language of s. 8 tend to confuse "not transferable" and "not negotiable." The question in *Silke's Case* was, "Was the cheque transferable?" It was decided that the above crossing did not prevent a bank taking the cheque from J. F. M. from acquiring a title to it as holders and suing the drawer upon it. (See § 23 and notes and § 30 and notes.)

The section only affords protection where the banker has received a cheque already crossed, and not where he crosses an uncrossed cheque for

collection under s. 77. (*Bissell* v. *Fox*, 51 L. T. R. 663, 53 L. T. R. 193; and cf. *Gordon* v. *London City and Midland Bank, supra.*)

By s. 95 the provisions of the Act as to crossed cheques are made applicable to dividend warrants.

To obliterate, add to or alter a crossing, special or general, of a cheque, or knowingly offer or utter, etc., a cheque so altered, with intent to defraud, is a felony punishable with penal servitude for life. (24 & 25 Vict. c. 98, s. 25.)

It is provided by s. 17 of the Revenue Act, 1883, that s. 25 of 24 & 25 Vict. c. 98, and ss. 76 to 82 of the Bills of Exchange Act, shall extend to "any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, . . . and shall extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render such a document a negotiable instrument."

Thus a cheque with a receipt form attached, and running "Pay . . . provided the receipt at the foot hereof be duly signed," may be a cheque within ss. 76 to 82, though, by reason of the conditional form, it falls without the rest of the Act. (*J. Bavins, Junr.* v. *London and S.-W. Bank*, 5 Com. Cas. 1, in which case the banker was

deprived of the protection of s. 82, as he had not acted without negligence.) Paget ("Decisions affecting Bankers," p. 295) regards s. 17 as only extending protection to cases where the banker collects for the original payee of such documents.

CHAPTER VI.

BLANK CHEQUES AND IMPERFECT CHEQUES—FRAUDULENT FILLING IN AND ALTERATION OF AMOUNT—THE WORDS AND FIGURES—MATERIAL ALTERATION—CRIMES RELATING TO FORGERY, ETC., OF CHEQUES.

52.—When a simple signature on a blank form of cheque is delivered by the signer in order that it may be converted into a cheque, it operates as a primâ facie authority to fill it up as a complete cheque for any amount; and in like manner, when a cheque is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit.

(*a*) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

(*a*) See *Flower* v. *Shaw*, 2 C. & K. 703. The plaintiff, a secretary, without authority filled up a cheque drawn by directors for an amount he alleged was due to him. Held, even if such sum was due, the cheque was a forgery and the plaintiff could not recover. Cf. also *R.* v. *Wilson*, 2 C. & K. 527.

Provided that, if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given. (S. 20.)

See cases cited in notes to §§ 28 and 37. A cheque handed to a payee is not negotiated to a holder in due course within ss. 20, 21 and 29. There can be no "negotiation" to an *immediate party*. (*Lewis* v. *Clay*, 67 L. J. Q. B. 224; *Herdman* v. *Wheeler*, 1902, 1 K. B. 472.)

53.—Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. (S. 9 (2).)

A banker, though justified in paying the amount in words, would in practice return such a cheque with answer, "Words and figures differ." (See Moxon, Practical Banking, 10th ed. p. 9.)

The words, however, are the governing and only essential part of the cheque, so far as the amount payable is concerned.

In *Garrard* v. *Lewis*, 10 Q. B. D. 30, the amount was inserted in figures only. A holder inserted a

larger sum in words, and altered the figures to correspond.

The drawer was held liable on the bill as altered, to a holder in due course. It was legally immaterial that the figures had been altered to suit the words, inasmuch as, even if they had not, the amount denoted in words would have been the amount payable. The amount in words should, therefore, be always filled in before issue.

54.—Where a cheque is so carelessly (*b*) filled up by the drawer, both as to words and figures, that it is capable of fraudulent alteration to a larger amount, and the cheque is so altered, and the alteration is not apparent, and the banker on whom the cheque is drawn pays the larger amount without negligence, then, as between the banker and the drawer, the loss falls on the drawer.

This embodies the much-criticized decision in *Young* v. *Grote*, 4 Bing. 253.

The facts were these: Young left a blank cheque with his wife to be filled up to pay wages. Worcester, his clerk, filled it up for 50*l.* 2*s.* 3*d.*, and showed it so filled up to Mrs. Young, who sanctioned it, although Worcester had left space enough to alter the amount. Afterwards Worcester

(*b*) Unless the customer is negligent, any loss consequent upon a fraudulent alteration falls on the banker. (*Hall* v. *Fuller*, 5 B. & C. 750, etc.)

altered the sum payable to 350*l.* 2*s.* 3*d.*, and the alteration was in no way apparent. The defendant, the banker, paid this sum to Worcester.

It was held that he could debit Young's account with 350*l.* 2*s.* 3*d.*, "as he had been misled by a want of proper caution on the part of his customer." (Best, C.J., at p. 260), and "as the blame is all on one side" (Burrough, J., at p. 260), and as "there was certainly great negligence on the part of Young" (Gaselee, J., at p. 261).

This case has been frequently adversely criticized.

In *Scholfield* v. *Londesborough*, 1896, A. C. 514, the respondent accepted a bill for 500*l.*, which was so drawn that S., the drawer, was enabled to alter it, without its being apparent, to 3,500*l.*

The House of Lords decided that a holder in due course could only recover 500*l.*

Halsbury, L.C., at p. 522, says *Young* v. *Grote* must be examined to see "how far it ought to be quoted as an authority for anything," and he proceeds to comment on it, and observes that the judgments show much confusion.

Now on one point all the four judges in *Young* v. *Grote* were agreed—Young had been negligent, and Grote had not.

It is true that Best, C.J., and Park, J., think the negligence consisted in Young's leaving blank cheques with his wife, who was ignorant of business.

It appears to us a better view that the negligence for which he had to suffer was that of his wife, who as his agent sanctioned the cheque drawn by Worcester with spaces for alteration. And Park, J., also decides upon the ground that the cheque left by Young to be filled up by his wife, "when filled up by her, became his genuine orders" (p. 260); and this reason is described by Halsbury, L.C., 1896, A. C. at p. 523, as "the perfectly sound view upon which he decides in the defendant's favour."

And Lords Watson and Macnaghten also think the decision supportable on the ground that the delivery of a blank cheque gives an implied authority to a holder to fill it up for any amount, and they cite Parke, B., in *Robarts* v. *Tucker*, 16 Q. B. 560, who, in commenting on *Young* v. *Grote*, said: "The customer had, by signing a blank cheque, given authority to the person in whose hands it was to fill up the cheque in whatever way the blank permitted."

But the cheque when fraudulently altered was *not* a blank cheque. It was a genuine order for 50*l*. 2*s*. 3*d*. We cannot understand the view of Park, J., and Halsbury, L.C., that the cheque could be regarded as a "genuine order" for the larger sum to which Worcester afterwards altered it.

Nor can we understand the same view, as expressed by Parke, B., and Lords Watson and Macnaghten,

that the decision turned upon the implied authority of a holder to fill up a blank cheque.

Willis, in his lectures (*c*) on negotiable instruments, expresses his opinion that the decision cannot be so regarded, inasmuch as the case was not one of filling up a blank cheque. In point of law, the case was as if Young, or Mrs. Young, as his agent, had written out the cheque for 50*l*. 2*s*. 3*d*., in the careless way in which it was written, and had then given it to Worcester.

The negligence which led to the loss was that of Mrs. Young in sanctioning the cheque as drawn by Worcester, and Young would have been no less liable for her negligence as his agent even had he been able to show that she was ordinarily a most accomplished woman of business. It appears to us, therefore, that the observations of Best, C.J., and of Park, J., as to the negligence consisting in leaving the cheque "with a female" are rightly condemned by Halsbury, L.C., as irrelevant.

It is also clear, as pointed out by Cockburn, C.J., that the case was "decided without reference to estoppel." It appears to us unnecessary to rely on that technical doctrine as the *ratio decidendi*.

The true ground appears to be that, rightly or wrongly, negligence was found as a fact against

(*c*) Lecture vi.

Young, and was expressly negatived as against Grote.

In *Swan* v. *North British Australasian Co.*, 2 H. & C. 175, the decision in *Young* v. *Grote* is freely commented upon, and Cockburn, C.J., explains that the decision may have been with the object to prevent circuity of action. Young could sue Grote for wrongfully paying the enlarged amount, and Grote could sue Young for the loss sustained by the latter's negligence.

In *Halifax Union* v. *Wheelwright*, 32 L. T. 802, it was held that a bank manager who acted as treasurer to the plaintiff corporation, and who had paid drafts drawn on him and fraudulently altered by a person in the employ of the corporation, could defend such payments on the ground that the carelessness of the corporation in signing the drafts, drawn so as to be easily capable of alteration by the person who wrote out the drafts, had led to the drafts being paid.

The defendant had also paid some drafts with forged indorsements, and it was held that he was not a banker within s. 19 of 16 & 17 Vict. c. 59, to which s. 60 of the present Act corresponds. However, in the peculiar circumstances of the case, he was held not liable for the amount of such payments, as the only receipt by him was the receipt of the bank of which he was manager, and

where the plaintiffs practically had the account in respect of which he was treasurer, and the bank being discharged under s. 19, he could not be made liable.

The principle upon which, as we think, *Young* v. *Grote* rests, that "a man cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own," was approved in the judgment of Cleasby, B., in the Court of Exchequer; and in *Orr* v. *Union Bank of Scotland*, 1 Macq. 513, Lord Cranworth, in commenting on *Young* v. *Grote*, said (at p. 523): "The decision went on the ground that it was by the fault of the customer the bank had been deceived. Whether the conclusion in point of fact was in that case well warranted is not important to consider. The principle is a sound one that where a customer's neglect of due caution has caused his bankers to make a payment on a forged order he shall not set up against them the invalidity of a document which he has induced them to act upon as genuine."

In *Scholfield* v. *Londesborough* there was some conflict of opinion as to whether the respondent had been negligent. Lopes, L.J., in the Court of Appeal thought he had.

Charles, J., who tried the case at first instance, found on the facts that he had not been negligent.

But both were agreed as to the general duty of an acceptor of a bill "not to be negligent with regard to the form of the instrument," contrary to the opinion of Esher, M.R., and Rigby, L.J.

The House of Lords inclined to the view that he had not been negligent. Halsbury, L.C., at p. 522, said: "I entirely concur that it . . . was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it." Lord Watson (at pp. 541, 542) expressed a similar view.

So far as the decision in *Young* v. *Grote* turned on the relation of banker and customer, the House of Lords does not expressly condemn it in *Scholfield* v. *Londesborough*. (See Lord Davey at p. 550; Lord Morris, p. 547; and Lord Shand, p. 548.)

In *Marcussen* v. *Birkbeck Bank* (5 T. L. R. 179, 463, and 646, Journal XI. p. 403, on the new trial only), it was held that the defence that the drawer's negligence in drawing the cheque had misled the banker into paying the amount as altered ought to have been properly put before the jury, and that it was not, and that there must be a new trial.

On the new trial, Mathew, J., directed the jury that if a cheque was so carelessly drawn as to expose a banker, using reasonable care, to the risk of paying what was not intended, the banker was not liable. (Journal XI. p. 403.)

This trial was previous to *Scholfield* v. *Londesborough*.

The latest decision on the point is contained in the decision of the Privy Council in the *Imperial Bank of Canada* v. *Bank of Hamilton*, 1903, A. C. 49. In that case a cheque was drawn for 5 dollars, and was certified by the drawee bank as good. The drawer then altered the amount to 500 dollars, and paid it into his newly-opened account at the appellants' bank. The respondents paid the cheque to the appellants without looking at their books, the cheque bearing the bank stamp as certified.

It was held that they were entitled to recover the amount so paid. There was no doubt that the condition of the cheque when certified afforded opportunity for the fraudulent alteration.

Lord Lindley said: "If the principle laid down in *Young* v. *Grote* could still be acted upon, the Bank of Hamilton . . . would be estopped from denying that the cheque was a certified one for 500 dollars. But after the decision in the House of Lords in *Scholfield* v. *Londesborough*, it was hopeless to contend that . . . the bank was not at liberty to prove that the cheque had been fraudulently altered after it had been certified."

It was further held that the payment of a certified cheque without reference to the books was not negligence.

Another point as to notice of dishonour is dealt with elsewhere.

Now it is to be observed that the justification of *Young* v. *Grote* rests upon a supposed legal duty on the customer to draw cheques with reasonable care. His neglect as between him and the banker will cause any resulting loss to fall on him.

Now in this Privy Council case the question of the duty of drawer to banker does not arise. It is a question of the duty of a banker to a holder for value, and the Court merely follows *Scholfield* v. *Londesborough* in deciding that the signing (to which the stamping here corresponded) of a bill, so filled up as to be capable of fraudulent alteration, is not negligence which can raise an estoppel.

Where trustees under a paving act signed cheques, which had been drawn by the clerk to the clerk to the trust in such a manner as to be capable of alteration, it was held that they could not charge the clerk to the trust with negligence, if the cheques were altered, nor with his clerk's misconduct in altering them, for it was their duty not to sign cheques so drawn. (*Whitmore* v. *Wilks*, 3 Car. & P. 364).

55.—When a cheque is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the cheque is discharged (*d*).

(*d*) If bankers pay a cancelled cheque drawn by a customer under circumstances which ought to have excited their suspicions

In like manner any party liable on a cheque may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right or recourse against the party whose signature is cancelled is also discharged.

A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a cheque or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. (S. 63.)

This section is of little practical importance as regards cheques. It is not the practice to have many indorsements on a cheque, nor to look to the indorsers for payment. However, their legal position is like that of indorsers of a bill, and it is quite possible to release any one by cancellation of his name. As to the right of a banker to return a cheque, cancelled by mistake under the impression that it was to be paid, see *Fernandez* v. *Glynn*, 1 Camp. 426, *n*.

56.—Where a cheque is materially altered without

and induced them to make inquiries before paying it, they cannot take credit for the amount. (*Scholey* v. *Ramsbottom*, 2 Camp. 485.)

the assent of all parties liable on the cheque, the cheque is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Provided that where a cheque has been materially altered, but the alteration is not apparent, and the cheque is in the hands of a holder in due course, such holder may avail himself of the cheque as if it had not been altered, and may enforce payment of it according to its original tenor. (S. 64 (1).)

The latter part of this sub-section covers the case of *Scholfield* v. *Londesborough*, 1896, A. C. p. 514, but it must be remembered that that decision turned on the fact that Londesborough had not been negligent. If a case like *Young* v. *Grote*, 4 Bing. 253, should arise to-morrow, and negligence were found as a fact against the customer, we do not think he could, as against his banker, rely on the words "according to its original tenor," if the banker without negligence had paid the cheque as altered.

57.—In particular the following alterations are material, namely, any alteration of the date, the sum payable, the crossing, and the branch at which the cheque is payable. (SS. 64 (2) and 76.)

The word "apparent" was in *Leeds Bank* v. *Walker*, L. R. 11 Q. B. D. 84, construed to mean

"apparent to the bank, though not perhaps to an ordinary person," but this construction was not necessary to the judgment, which was that the latter part of s. 64 (1) did not apply to a Bank of England note.

To alter the date of a cheque to a subsequent date is a material alteration within this section. (Cf. *Vance* v. *Lowther*, 1 Ex. Div. 176.)

For a more exhaustive list of material alterations, the reader is referred to Chalmers' notes to this section and to Byles, Chap. XXI.

To forge or alter or knowingly utter, etc., any cheque or any indorsement or assignment of any cheque is a felony punishable with penal servitude for life. (24 & 25 Vict. c. 98, s. 22.)

To draw, sign or indorse a cheque without authority, or knowingly utter such a cheque, is a felony punishable with penal servitude for fourteen years. (24 & 25 Vict. c. 98, s. 23.)

CHAPTER VII.

FORGED SIGNATURES—WHEN THE BANKER IS PROTECTED — ESTOPPEL — WHEN THE DRAWER IS PRECLUDED FROM DENYING THE GENUINENESS OF A SIGNATURE.

58.—S. 24 of the Act provides that—

Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

The word "cheque" should be read here for the

word "bill." It seemed better to cite the original section in this instance. When the "forged or unauthorized signature" is in fact unnecessary to negotiate or pass a title to the cheque, as in the case of a "bearer" cheque, a holder for value can acquire a good title, and is not liable to the drawer or any other party, if he obtains payment of the cheque, since his title cannot be affected by the signature, delivery without indorsement conferring it. (Cf. *Sweeney* v. *Freedman*, 35 Ir. L. T. 187.)

The great case on this section was *Bank of England* v. *Vagliano*, 1891, A. C. 107, on a bill of exchange, which was a forgery throughout, the drawer's signature, the name and indorsement of the payees all being forged. The name of the payees was not a name of fictitious persons: there were in fact such persons, but their name had been inserted in a bill, which was a fiction throughout, and it was held that the bill was payable to fictitious persons (*a*) within s. 7 (3), and so was payable to bearer.

It was followed in *Clutton* v. *Attenborough*, 1897, A. C. 90.

Clutton's clerk procured by fraudulent representations cheques to be drawn by Clutton in favour of a fictitious person "G. B." (The payees in *Vagliano's Case* were real *persons*, though not real

(*a*) See § 12 in Chapter II.

payees, a point unsuccessfully raised by Russell, Q.C., for the acceptor, Vagliano.)

The clerk indorsed the cheques "G. B." and negotiated them to Attenborough. It was held that the cheques were drawn payable to "a fictitious or non-existing person" within s. 7 (1), and accordingly were rightly treated as payable to bearer, and that it was immaterial that Clutton, when he so drew the cheques, believed there was such a person as G. B., and accordingly Clutton could not recover from Attenborough the amount of the cheques paid to Attenborough by the bank on which they were drawn.

Lord Bramwell and Lord Field dissented in *Vagliano's Case*, the former with characteristic vigour and frankness. But *Clutton* v. *Attenborough* is not so strong a case. The payee there was an absolutely non-existing person; in *Vagliano's Case*, the payees were a well-known firm, who could only be described as "fictitious persons" by a straining of language. They were so considered because the bill was a fiction throughout. It was as if the forger had opened a directory and put down the first name he came across. (Cf. Halsbury, L.C., at p. 121.)

59.—When a cheque is drawn on a banker, and the banker on whom it is drawn pays in good faith and in

the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the cheque in due course, although such indorsement has been forged or made without authority. (S. 60.)

(Cf. *Hare* v. *Copeland*, 13 Ir. C. L. R. 426.)

This is the chief of the provisions excepted in s. 24. The section does not cover the case of a person receiving payment on a forged indorsement (cf. *Ogden* v. *Benas*, 43 L. J. C. P. 259), or a banker paying on a forged drawer's signature. (Cf. *Orr* v. *Union Bank of Scotland*, 1 Macq. 513.)

The payment must be "in the ordinary course of business." A bank paying a crossed cheque in contravention of the crossing could not rely on this section. (Cf. *Smith* v. *Union Bank*, L. R. 10 Q. B. at p. 296.)

Charles v. *Blackwell* (1 C. P. D. 548, 2 C. P. D. 151) was on 16 & 17 Vict. c. 59, s. 19, and it was decided that a banker was protected, who paid the amount of a cheque to an agent, who without any authority so to do, indorsed it "per pro." and kept the proceeds. The loss fell on his principal.

S. 60 undoubtedly covers such a case.

Under s. 19 of 16 & 17 Vict. c. 59, bankers may

be protected who pay on forged indorsements in the case of instruments falling outside the Act. A banker's draft, for example, though not within the Act, comes within s. 19, which includes "any draft or order upon a banker for a sum of money payable to order on demand." (*Gordon* v. *London City and Midland Bank*, 1903, A. C. 240.) So also would a cheque with a receipt form attached as in *J. Bavins, Junr.* v. *London and South-Western Bank* (5 Com. Cas. 1).

Ss. 54 and 55 contain further exceptions to s. 24. The material provisions of these have been set out in Chapter II., § 5 and § 16 (b) and (c).

Ss. 80 and 82 (set out in Chapter V., §§ 49 and 51) protect a banker on whom a crossed cheque is drawn, and the banker who collects such cheque respectively.

60.—A customer of a banker, who by his conduct has led the banker to believe that the signatures of any cheques purporting to be drawn by him are his, whereby the banker has been induced to pay such cheques and has paid them without negligence, may be precluded from denying against such banker the genuineness of such signature.

This is on the ground of estoppel. The leading case on this species of estoppel is *M'Kenzie* v. *British Linen Co.*, 6 A. C. 82. The material facts

in that case were: A bill purporting to be drawn by M. and indorsed by him to the respondent bank was discounted by the bank for C., who signed as acceptor. On dishonour, notice was sent to M., reaching him late on Saturday, April 12th. On the 14th, the next business day, C. brought the bank a fresh bill, drawn and accepted as before, for a smaller sum, the bank accepting it as a renewal on receiving the difference in cash. On July 14th the bank gave M. notice that the second bill was due on the 17th. On dishonour, the bank gave notice and wrote again to M. on July 25th. On the 29th M. first informed the bank that his signatures to the bill were forged and that he declined to pay. It was held that as M. could not, "with the utmost diligence," have informed the bank of the forgery of the first bill before the second was uttered to it, and as M.'s first intimation of the second bill was the notice of its dishonour, his neglect for fourteen days to inform the bank of the forgeries did not in fact prejudice the bank, inasmuch as no remedy was lost or money advanced in consequence of M.'s silence. If M. had maintained silence at a time when he had reason to believe the acceptor would be allowed to draw against the second bill, he would have been estopped.

Where a customer, whose account was debited

with forged cheques, refrained from informing the bank, in reliance on the statement of its agent that his silence would be in the bank's interest, it was held he was not estopped from afterwards setting up the forgeries. "It is obvious," said Lord Watson, in delivering the judgment of the Court, "that the question of estoppel . . . differs widely from the question in *M'Kenzie* v. *British Linen Co.* and similar cases. The ground on which the plea of estoppel rested in these cases was the fact that the customer, being in exclusive knowledge of the forgery, withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced. Here an agent of the bank had earlier and better information as to the forgeries than the customer himself." (*Ogilvie* v. *West Australian, etc., Corp., Ltd.*, 1896, A. C. 257, at p. 268.) The customer's silence was found, as a fact, to have been honest.

In *Chatterton* v. *London and County Bank* (Journal XI., 333), Day, J., advised the jury that the plaintiff should suffer the loss incurred by repeated alleged forgeries by his clerk. The pass book, containing in its pocket the alleged forged cheques, had been sent weekly to the plaintiff, who failed to notify the bank of any irregularity, whereby it was induced to go on paying the cheques with the alleged forged signatures. The jury, however,

found that the signatures were not forgeries, and though they also found that plaintiff's conduct contributed to the loss, judgment must have been for the defendants in any case on the first finding.

Negligence to amount to an estoppel must be in the transaction itself and be the proximate cause of leading the party astray, who seeks to set up the estoppel. It must be a neglect of some duty owing to such party or to the general public. (*Arnold* v. *Cheque Bank; Arnold* v. *City Bank*, 45 L. J. C. P. 562.) Negligence in the custody of a cheque or in its transmission by post will not estop the true owner from recovering its proceeds from one who has wrongfully obtained possession of it (same cases and *Patent Safety Gun Cotton Co.* v. *Wilson*, 49 L. J. C. P. 713), for such negligence is not in the transaction itself, but collateral to it.

CHAPTER VIII.

OVERDUE CHEQUES — STALE CHEQUES — POST-DATED CHEQUES—CHEQUES NOT DATED—PRESENTMENT FOR PAYMENT—DISHONOURED CHEQUES—WHEN NOTICE OF DISHONOUR IS NECESSARY—WHEN A BANKER MUST DISHONOUR A CHEQUE—CHEQUES DRAWN WITH NO EFFECTS — WHEN PROPERTY PASSES IN CONSIDERATION OF SUCH CHEQUES—WHEN GIVING SUCH CHEQUES IS CRIMINAL.

61.—A cheque is overdue when it appears on the face of it to have been in circulation for an unreasonable length of time.

What is an unreasonable length of time for this purpose is a question of fact. (S. 36 (3), S. 73.)

There are no decisions on overdue cheques since the Act.

In *Down* v. *Halling*, 4 B. & C. 330, Bayley, J., at p. 333, points out that cheques being intended for immediate payment and not for circulation ought to be presented on the same or the following day. Here six days had elapsed. "This is, therefore, just like the case of a bill taken after

it is due, and the party taking it has no better title than the person from whom he took it."

Holroyd, J., delivered a similar judgment, in the course of which he said: "This cheque must be considered in the same light as a bill taken after it is due." His judgment thus concludes on p. 334: "I think that when the defendants took the cheque more than a reasonable time for presenting it for payment had elapsed, and therefore they took it at their peril." In *Boehm* v. *Sterling*, 7 T. R. 423, Kenyon, C.J., expressed the view that there was no difference between bills and cheques as regards the effect of their being overdue.

In *Rothschild* v. *Corney*, 9 B. & C. 388, a cheque six days old was held not to be taken subject to equities, as no fixed rule could be laid down, and the direction of Tenterden, C.J., to the jury that they ought to consider whether the defendants took the cheques under circumstances that ought to have excited the suspicions of prudent men was approved.

It was held that the rule applicable to bills could not be applied to cheques. (See Littledale, J., at p. 391.) But Lord Tenterden's remark on p. 390, "that it cannot be laid down as a matter of law, that a party taking a cheque after any fixed time from its date does so at his peril," seems no answer to the contention that it is a question of fact in

each case whether a cheque has been in circulation for more than a reasonable length of time. *Down* v. *Halling*, though cited at the bar, is overlooked in the judgment, although both the Chief Justice and Bayley, J. were also parties to that decision.

In *Ex parte Hughes*, 43 L. T. 577, the Chief Judge seems to fluctuate between the two views. Both *Down* v. *Halling* and *Rothschild* v. *Corney* were cited before him, but he does not notice their discrepancy, and he proceeds to say, *inter alia*: "Unless I can persuade myself that William Hughes took the cheques *bonâ fide*, having made such inquiries as a prudent man would make, a case of common law rights must necessarily arise as to whether the equities which exist with respect to overdue bills are intended in these cases to be applicable for actual overdue cheques or not."

But "the equities, which exist with respect to overdue bills," are that when a bill is overdue—and the test of this is, in the case of a demand draft, whether it has been in circulation for an unreasonable length of time—it is not negotiable, and the taker takes it subject to the transferor's defects of title.

If, therefore, this rule applies to cheques, it was needless to inquire whether W. Hughes took with or without inquiry. If it does not, then considering whether W. Hughes took with or without

inquiry could not be a preliminary to considering whether "the equities, which exist with respect to overdue bills," are applicable to cheques.

In *Serrell* v. *Derbyshire Railway Co.*, 9 C. B. 811, Maule, J., was inclined to think that a stale cheque (two months old) was on the same footing as an overdue bill, but it was not necessary to decide this point.

In *London and County Bank* v. *Groome*, 8 Q. B. D. 288, the previous decisions are reviewed by Field, J., who points out that bills, payable at a future date, are negotiated before maturity, unlike cheques payable on demand. The negotiation of a bill after maturity is therefore in itself a circumstance to excite suspicion. He regards *Down* v. *Halling* (*supra*) as laying down no general rule, and, relying on a passage in Holroyd, J.'s, judgment in which he said, "Now in this case the cheque had been due five days at the time when it was taken by the defendants; that was a circumstance which ought to have excited their suspicions," he thinks the question for the jury is—"Was the cheque taken under such circumstances as ought to have excited suspicion?" and he therefore held that the plaintiff, who took a cheque eight days after date, took free from defects of title affecting the transferor and could recover.

If, therefore, the question were still one of case

law merely, there would be considerable difficulty in overcoming the view that the question for the jury ought to be, as was suggested in *Rothschild* v. *Corney*, and *London and County Bank* v. *Groome*, "Was the cheque taken under such circumstances as ought to have excited suspicion?" But looking at the very plain provisions of ss. 36 (2) and (3), and 73, it is difficult to resist the conclusion that the Act has placed cheques on the same footing as bills if they were not so before. In some respects the Act, though an Act to *codify* the law, has *modified* it; for instance, it has by s. 74 modified the extent to which a drawer is discharged by the failure to present a cheque within a reasonable time. And so here it appears to have restored the law to what it was as established by *Down* v. *Halling*, and to have deprived the later cases of authority, except in so far as they may be of value on the question of what is in point of fact a reasonable time for a cheque to be in circulation.

It is clear that the way in which the case is left to the jury as one of "reasonable time" or as one of "suspicious circumstances" may have an all-important effect upon the verdict and consequent judgment. In the words of Chalmers, "The cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act." It is

singular, therefore, that he cites *Groome's Case* without any comment as illustrative of s. 36 (3), and Byles (ed. 16, p. 23) treats it as illustrative merely of what has been held a "reasonable time." In the latest edition of "Leake on Contracts," it is cited to show that cheques in this respect differ from bills, and it is also one of the cases in Paget's "Decisions affecting Bankers," with, however, a footnote referring to s. 36 (3).

In the author's view, whatever may have been the correct interpretation of *Down* v. *Halling*, the proper question for the jury now is—"Was the cheque taken after more than a reasonable time had elapsed since issue?" Demand bills other than cheques being in little use in England, cheques are virtually the only form of instrument to which s. 36 (3) can apply, since bankers' drafts are not instruments within the Act.

62.—Where an overdue cheque is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had. (S. 36 (2).)

The words "affecting it at its maturity," in the case of a cheque, mean affecting it on the day it is drawn or issued, or between then and the negotiation in question, since a cheque is payable on

demand. In the case of bills not so payable, it is possible for a defect of title to be cured by negotiation to a holder in due course before the bill matures. (Cf. *Chalmers* v. *Lanion*, 1 Camp. 383.) We have considered the cases in the notes to § 61.

An overdue cheque ceases therefore to be "negotiable," though it is still "transferable."

63.—Where a cheque or any indorsement on a cheque is dated, the date is, unless the contrary be proved, to be deemed to be the true date of the drawing or indorsement as the case may be. (S. 13 (1).)

It is not the practice to date the indorsements on cheques. It might be material to show the order of the indorsements.

64.—A cheque is not invalid by reason only that it is ante-dated or (*b*) post-dated, or that it bears date on a Sunday. (S. 13 (2).)

It is now definitely decided that a post-dated cheque is a valid instrument under s. 13 (2), and it is not taken out of the general provisions of the Act and of this particular sub-section by being post-dated, contrary to the tenor of the first part of s. 73.

In *Royal Bank of Scotland* v. *Tottenham*, (1894)

(*b*) If it is considered of any use to object to a cheque on the ground of its being post-dated, such a defence need not be pleaded. See *Field* v. *Woods*, 8 C. & P. 52, but we conceive that such an objection would now be useless.

2 Q. B. 715, the infant payee of a post-dated cheque indorsed it before the day of date to M., who paid it into her account, and drew against it.

It was dishonoured on presentment. Her bankers successfully sued the drawer, as holders in due course. Various contentions were raised by the drawer, which have been dealt with elsewhere.

Before Wills, J., at the trial it was unsuccessfully argued that (1) an indorsement of a post-dated cheque, before the cheque is due, is inoperative, as it is till then an inchoate instrument and in suspense; (2) such a cheque, not being payable on demand, is not an instrument within the Bills of Exchange Act, in view of s. 73, and an infant could not therefore validly indorse it under s. 22.

In the Court of Appeal several points were taken. The material one for our present purpose was on s. 38 of the Stamp Act (54 & 55 Vict. c. 39). It provides that "Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped, shall incur a fine of ten pounds, and the person who takes or receives any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever."

It was argued that a post-dated cheque was really

a bill at as many days as intervened between the date of issue and the date of the cheque, and that it consequently required the same *ad valorem* stamp as a bill for a like amount not payable on demand, that the cheque in question was not so stamped and could not under the latter part of the first sub-section of s. 38 be sued upon.

The Court of Appeal decided that such a construction would make a post-dated cheque practically invalid, contrary to s. 13 (2) of the Bills of Exchange Act, and was untenable, and that all objections under the Stamp Act must be determined by the conditions existing when the question is raised. The cheque being on the face of it sufficiently stamped at the *date of trial* was therefore properly admissible in evidence and could be recovered upon.

It is conceived, however, that to post-date a cheque may expose the drawer to a penalty under s. 5 or s. 38 of the Stamp Act. (See Chalmers, p. 352.) It is virtually a fraud on the Revenue Cheques might be made payable "on demand" at a date three or six months hence, and so avoid the higher duty. A cheque dated 7th June, running "Pay on the 10th June," requires a bill stamp, and matures on June 13th.

In *Forster* v. *Mackreth*, L.R. 2 C. P. 163, a partner in a firm of solicitors had authority to draw cheques

in the firm's name. He drew a cheque post-dated seven days. An authority to draw bills on behalf of a firm is not an incident of an ordinary, non-trading partnership, such as a firm of solicitors. It was held that the post-dated cheque, given to secure a personal loan, was in reality a bill at seven days, and the firm was not liable thereon to a holder in due course, as the partner had no authority to draw bills in the firm's name.

The (*c*) validity of a post-dated cheque had been decided in *Gatty* v. *Fry*, 1877, 2 Ex. Div. 265, before the present Stamp Act or Bills of Exchange Act. Where the payee of a cheque, which is post-dated, becomes bankrupt between the day of receiving the cheque and the day of date, and notice thereof is sent to the drawer, there is no obligation on the drawer to stop payment of such cheque for the benefit of the payee's (*d*) creditors. (*Ex parte Richdale*, 19 Ch. D. 409.) It might have meantime been negotiated to a holder in due course,

(*c*) Cf. also *Whistler* v. *Forster*, 14 C. B. N. S. 248; *Williams* v. *Jarrett*, 5 B. & Ad. 32; *Austin* v. *Bunyard*, 6 B. & S. 687; *Bull* v. *O'Sullivan*, 40 L. J. Q. B. 141; *Misa* v. *Currie*, 45 L. J. Q. B. 852; *Hitchcock* v. *Edwards*, 60 L. T. 636; *Emanuel* v. *Robarts*, 9 B. & S. 121.

(*d*) Where a garnishee order is served upon the drawer of a cheque between the giving of a cheque for value and the payment thereof, there is no obligation on him to stop payment. (*Elwell* v. *Jackson*, 1 Cab. & E. 362.)

to an action by whom the drawer would by stopping payment expose himself.

For another point decided by this case the reader is referred back to § 23.

65.—Subject to the provisions of the Act a cheque must be duly presented for payment. If it be not so presented the indorsers shall be discharged, and the drawer shall be discharged to the extent provided in rule (2) hereunder. A cheque is duly presented which is presented in accordance with the following rules:

Subject to rule (2) failure to present within a reasonable time does not discharge the drawer of a cheque, as it does the drawer of a bill. (Cf. *Robinson* v. *Hawksford*, 9 Q. B. 52.) He can be sued at any time within six years. (Cf. *Laws* v. *Rand*, 3 C. B. N. S. 442, a case under the old common law rule, by which, if the drawer had suffered at all by the delay (*e*), he was discharged, but otherwise remained liable for six years.)

(1) As regards the indorser, presentment must be made within a reasonable time after its indorsement in order to render the indorser liable. (S. 45 (2).)

(2) As regards the drawer, where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account

(*e*) See *Hopkins* v. *Ware*, 38 L. J. Ex. 147.

it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. (S. 74 (1).)

(3) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (S. 74 (2).)

(4) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day at the bank whereon the cheque is drawn. (Cf. S. 45 (3).)

The cases prior to the Act establish the following rules as to time within which presentment must be made. Their value is in some cases doubtful, as the effect of s. 74 may be to introduce "a new and less rigorous measure of reasonable time." (Chalmers.) Four of these rules are borrowed from Chalmers, namely, 1, 2, 3 and 5.

(1) If the person who receives a cheque and the banker on whom it is drawn are in the same place, the cheque must, in the absence of (*f*) special circumstances, be presented for payment on the

(*f*) *E.g.*, illness of payee, as in *Firth* v. *Brooks*, 4 L. T. N. S. 467.

day after it is received. (*Firth* v. *Brooks*, 4 L. T. N. S. 467; *Alexander* v. *Burchfield*, 7 M. & Gr. 1061 (*g*).) And if crossed it must still be presented on the day after it is received, if received in time for payment into the holder's bank on the day of receipt. (*Alexander* v. *Burchfield*, *supra*, but this was before crossing received legislative sanction, and is now of doubtful authority.)

(2) If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must, in like manner, present it, or forward it on the day after he receives it. (*Hare* v. *Henty*, 10 C. B. N. S. 65; *Prideaux* v. *Criddle*, 10 B. & S. 515.)

(3) In computing time non-business days must be excluded, and when a cheque is crossed any delay caused by presenting the cheque pursuant to the crossing is probably excused. (Cf. *Alexander* v. *Burchfield*, 7 M. & Gr. 1061, and *Springfield* v. *Lanezzari*, 16 L. T. 361.)

(4) Any delay caused by the cheque having to

(*g*) See also *Moule* v. *Brown*, 4 Bing. N. C. 266, where cheque was cashed by plaintiff bank on the 28th and presented on the 31st, and was held not to be in due time; and *Bailey* v. *Bodenham*, 16 C. B. N. S. 288.

pass through the hands of an agent for collection, in lieu of direct presentment, is excused (*Prideaux* v. *Criddle*, 10 B. & S. 515; *Bond* v. *Warden*, 14 L. J. Ch. 154), and a custom to collect through agents of the two banks using a common clearing house will be recognised, and delay occasioned by such mode of collection, in lieu of direct presentment, is excused (*h*). (*Prideaux* v. *Criddle, supra; Hare* v. *Henty*, 10 C. B. N. S. 65.)

(5) Where authorised by agreement or usage a presentment through the Post Office is sufficient. (S. 45 (8), and cf. *Bailey* v. *Bodenham*, 16 C. B. N. S. 288; *Heywood* v. *Pickering*, 43 L. J. Q. B. 145.)

(6) A banker guilty of delay in presenting a cheque is liable to his customer for any resulting loss. (*Hare* v. *Henty, supra; Boddington* v. *Schlencker*, 4 B. & Ad. 752; *Forman* v. *Bank of England*, 18 T. L. R. 339.) In *Boddington* v. *Schlencker* it was contended that, by the custom of the city of London, a banker, receiving a cheque from his customer, must, as between himself and the customer, present it the same day, notwithstanding that, as between the customer and the drawer, the former would have a day within which to present it, but the Court, while not satisfied of the

(*h*) See also *Beeching* v. *Gower*, Holt, 313.

existence of the custom, decided that it was in any case inapplicable in the case before them, which was between the payee and the drawer.

(7) Where a cheque is expressed to be payable in two places, the holder may present it at either and is not prejudiced by delay consequent upon presenting it at the remoter of such places (*Beeching* v. *Gower*, Holt, 313), but where a cheque was apparently payable at Norwich or in London, the jury found upon the evidence, that there was a custom to treat such cheques as London cheques, and the defendants, the collecting bankers, were liable for presenting it at Norwich through their country clearing house, whereby it was collected later than it would have been in London, and consequently the plaintiff's cheque, drawn against it the day after he paid it in, was dishonoured. He paid in the cheque on the 21st May. It was a rule of the defendant bank that cheques drawn on city banks, paid in before 3 P.M., could be drawn against next day. The plaintiff drew a cheque on 22nd May against the cheque in question, without which he had no balance to meet the cheque he had drawn. Had the cheque he paid in been treated as a city cheque, the cheque he drew would have been honoured. In consequence of its being treated as a country cheque his cheque was dishonoured, and he was held entitled to recover damages for

the dishonour of his cheque. (*Forman* v. *Bank of England*, 18 T. L. R. 339.)

(8) What is a "reasonable time" is a question of fact. (*Serle* v. *Norton*, 2 M. & Rob. 401.)

66.—It is further provided by s. 74 (3) that, "The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him."

67.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder (*i*), and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (S. 46 (1).) (See notes to § 65.)

By s. 46 (2) it is provided as follows:—

Presentment for payment is dispensed with—

(a) Where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected. The fact that the holder has reason to believe the bill (*k*) will on presentment be dishonoured does not dispense with the necessity for presentment.

(b) Where the drawer is a fictitious person.

(*i*) *E.g.*, his illness, *Firth* v. *Brooks*, 4 L. T. 467.

(*k*) Includes "cheque" by s. 73.

(c) As regards the drawer, where the drawee or acceptor is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect the bill would be paid if presented.

(e) By waiver, express or implied.

Clause (c) is the only one calling for comment, as far as cheques are concerned. It will be observed that it covers the common cause of dishonour—"no effects," and presentment is in this case unnecessary. (*Wirth* v. *Austin*, L. R. 10 C. P. 689.)

It is a custom of city banks to mark cheques presented after four o'clock as good, if there are assets to meet them. This dispenses with any need for further presentment to the bank. But it does not impose, it seems, on the banker the liability of an acceptor to any holder. (See *Robson* v. *Bennett*, 2 Taunt. 388.) Nor does the receipt and retention for a day of a cheque paid into a bank, which is both drawer's and holder's bank. It is presumed to receive as collecting banker. (*Boyd* v. *Emmerson*, 2 A. & E. 184.)

In *In re Bethell*, 34 Ch. Div. 561, B. gave P. an undated cheque, telling him he had at present no

funds, but was expecting a loan and would then have funds to meet it, and he would then telegraph to P., who could fill in the date. On a subsequent occasion he told P. the negotiations for the loan were broken off. It was held, (1) that if P. was entitled and bound to hold the cheque for a reasonable time, pending the negotiations for a loan, that right or obligation came to an end when he heard the negotiations were broken off. (2) That presentment for payment was excused under s. 46 (2, c), as, when the negotiations were broken off and it was time for presentment, the banker had no funds of B.'s in his hands, and accordingly time ran under the Statute of Limitations from when P. heard that the negotiations had been broken off, and P.'s claim was statute-barred, as more than six years had since elapsed.

68.—A cheque is dishonoured by non-payment when it is duly presented for payment, and payment is refused or cannot be obtained. (S. 47 (1).)

Subject to the provisions of the Bills of Exchange Act, when a cheque is dishonoured an immediate right of recourse against the drawer and indorsers accrues to the holder. (S. 47 (2).)

This section, of course, was framed for the case of bills. The acceptor of a bill is primarily the person to pay, and he is not, like a banker, the drawer's agent for payment.

69.—Subject to the provisions of the Act, when a cheque has been dishonoured by non-payment, notice of dishonour must be given to the drawer and each indorser, any drawer (*l*) or indorser to whom such notice is not given is discharged. (S. 48.)

S. 49 of the Act provides as follows :—

"Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules :—

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as herein-before provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(*l*) The holder need only give notice to those he intends to sue ; an indorser cannot object that the holder never gave the drawer notice. (Cf. *Rickford* v. *Ridge*, 2 Camp. 537.)

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be

given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day; and if there be no such post on that day, then by the next post thereafter.

(13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

For the purpose of giving notice of dishonour the various branches of a bank are distinct parties. (*Clode* v. *Bayley*, 12 M. & W. 51; cf. *Prince* v. *Oriental Bank*, 3 A. C. 325, at p. 332; and *Fielding* v. *Corry*, 1898, 1 Q. B. at pp. 273, 274.)

Prideaux v. *Criddle*, 10 B. & S. 515, is a case illustrative of sub-s. 13. It was held that when the drawees received a cheque on the 7th June, and notified B. & Co., the agents of the plaintiff bank, on the 8th, and the plaintiff bank notified the defendant on the 9th, the defendant received due notice of dishonour. It was said, "If the drawer dishonours a cheque, and the holder sends a notice of dishonour to the person from whom he received it on the day following that on which it was dishonoured, that person and each previous transferor has one day within which to give notice of dishonour."

Where a customer pays in a cheque drawn on

his bank by another customer, the bank is entitled to the same time for ascertaining whether the cheque will be paid and for giving notice of dishonour as if the cheque were drawn on another bank. (*Chambers* v. *Miller*, 13 C. B. N. S. 125.)

In *Fielding* v. *Corry*, 1898, 1 Q. B. 268, a letter containing notice of dishonour was sent off in time to the wrong branch of a bank. Next day a telegram was sent to the proper branch, which sent off its notices in time. It was held that the bank had received sufficient notice of dishonour.

Collins, L.J., dissented, and we have less difficulty in comprehending his view.

The fact that the notice was not sent in time to the right branch seems to us to make all the notices bad, those given by the bank as well, inasmuch as a notice to be valid must be given by a party liable on the bill, and the bank appears to have been discharged by failure to send off the notices to it in time. S. 49 (12) speaks of when the notices must be "sent off." The only real notice, that by telegram, was *not* sent off to the bank in time.

It has been held in regard to bills that the holder of a bill is entitled to know on the day when it is due whether it is an honoured or dishonoured bill, and that if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. (*Cocks* v.

Masterman, 9 B. & C. 902; *London and River Plate Bank* v. *Bank of Liverpool*, 1896, 1 Q. B. 7, etc.) Such cases have arisen where a bill with a forged acceptance has been paid by a banker, and next day, the forgery being discovered, notice thereof is given, and the money is sought to be recovered from the recipient of payment.

In *The Imperial Bank of Canada* v. *Bank of Hamilton*, 1903, A. C. 49, it was pointed out that this rule could not arise where there is in point of fact no person entitled to notice of dishonour, where the drawer had committed a forgery to the extent to which the cheque in that case exceeded the amount for which it was certified and was entitled to no notice, and there was no indorser entitled to notice.

In that case a cheque certified for 5 dollars was fraudulently altered to 500 dollars by the drawer. On presentment by a holder for value it was paid. Next day the fraud was discovered, and notice was given to the party who had received payment. It was held that the money paid could not be recovered. There was no one discharged from liability by the omission to give notice on the day of payment, and the rule in *Cocks* v. *Masterman* did not apply.

S. 50 of the Act provides as follows:—

(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond

the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:

(b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person; (2) where the drawee is a fictitious person, or a person not having capacity to contract; (3) where the drawer is the person to whom the bill is presented for payment; (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill (*m*); (5) where the drawer has countermanded payment:

(d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to

(*m*) Cf., *e.g.*, *Kemble* v. *Mills*, 1 Man. & Gr. 757.

contract, and the indorser was aware of the fact at the time he indorsed the bill; (2) where the indorser is the person to whom the bill is presented for payment; (3) where the bill was accepted or made for his accommodation.

In the case of cheques, the two chief causes of dishonour are—

(1) Countermand of payment, and

(2) Absence of effects of drawer in the hands of the banker—*i.e.*, of *sufficient* effects, not necessarily of *any* effects. (See *Carew* v. *Duckworth*, 38 L. J. Ex. 149.)

It will be seen that in each of these cases notice of dishonour is dispensed with as regards the drawer. (See clause (c) of sub-s. 2, sub-clauses (4) and (5).) If the customer, though having no effects, were allowed to overdraw under a guarantee or some other arrangement, he would probably be entitled to notice of dishonour. (Cf. *Carew* v. *Duckworth*, 38 L. J. Ex. 149.)

Even where notice of dishonour is dispensed with, the circumstances dispensing with it must be alleged on the indorsement of a writ specially indorsed under Order III., rule 6, although they need not also be set out in the affidavit in support of summary judgment under Order XIV. r. 1. (*Fruhauf* v. *Grosvenor*, 61 L. J. Q. B. 717; *May*

v. *Chidley*, 1894, 1 Q. B. 451.) Cheques are not "noted" or "protested" on dishonour.

70.—Where a banker has received notice of an available act of bankruptcy committed by a customer, or where a receiving order has been made against a customer, he is bound to refuse payment of any cheques subsequently presented, drawn by such customer. (Bankruptcy Act, 1883, ss. 9, 49 and 168.)

When a garnishee order *nisi* has been served on a banker, he is justified in dishonouring all cheques of the customer in respect of whose debt the order has been obtained, notwithstanding that the judgment against the customer may be for a less sum than the amount standing to his credit at the bank.

This was decided in *Rogers* v. *Whiteley*, 1892, A. C. 118. It turns on Order XLV. rr. 1 and 2. A garnishee order is an order attaching a debt due from a third person to a judgment debtor; *e.g.*, A. gets judgment against B. for 50*l.* C. owes B. 25*l.* A. by a garnishee order attaches that 25*l.* in C.'s hands.

71.—The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1) Countermand of payment.

(2) Notice of the customer's death.

The death of one of two partners does not determine the authority of the survivor to draw cheques on the firm's account. (*Backhouse* v. *Charlton*, 8 Ch. D. 444.)

72.—Where a cheque is given as payment for goods, and the cheque is subsequently dishonoured, the property will pass to the vendee, if he had reasonable ground to believe the cheque would be paid.

(*Bristol* v. *Wilsmore*, 1 B. & C. 514; *Hawse* v. *Crowe*, R. & M. 414. The question of the intent with which a worthless cheque is given is for the jury: *Bristol* v. *Wilsmore*, *supra*. In *Loughnan* v. *Barry*, 5 Ir. R. C. L. 538, it is said that the question is not whether he had reasonable grounds to believe the cheque would be paid, but whether he had such grounds for believing he had funds to meet it.)

73.—Where he had no such reasonable ground, then, inasmuch as he obtained the goods by fraud, he acquires a title to the goods, which is voidable at the election of the vendor, but he can, until his title is avoided, make a good title to a bonâ fide purchaser. (Sale of Goods Act, ss. 23 and 24 (2).)

In *Hawse* v. *Crowe*, *supra*, it was said that if the vendee had no such reasonable belief, the transaction was fraudulent, and the vendor could recover the goods. And so he could to this day as against

the vendee, but not as against a *bonâ fide* purchaser from him, in view of s. 23 and s. 24 (2).

Hawse v. *Crowe* was before the Sale of Goods Act; had it been necessary to decide whether a purchaser from the vendee had any title, the decision might have been different from what it would be to-day.

The giving of a worthless cheque in exchange for cash or goods does not amount to obtaining money or goods by false pretences, unless it be proved that the so giving amounted to a representation that the prisoner had authority to draw the cheque, or that the cheque was a good and valid order for the then payment of money; such representation is to be deemed to be a representation of fact and not of a future event. Proof that at the time of giving the cheque the prisoner knew that he had no funds in the bank is not *per se* enough, as it does not amount to a false pretence that the prisoner had money in the bank, since he might have been permitted to overdraw as a matter of favour or arrangement, or might have expected to have the money, when the cheque was presented.

(*R.* v. *Parker*, 2 M. C. C. 1; *R.* v. *Hazelton*, 13 Cox, C. C. 1.)

In the former case the prisoner had no account at the bank on which he drew. In the latter he had an account but no balance. The fraudulent

intent was transparent in the first case. The only difficulty was a technical one—whether the representation was not of a future event as opposed to an existing fact, and six eminent judges on this ground thought the conviction wrong, and Brett, J., in the latter case shared their doubts, but felt bound by the decision of the majority in *Parker's Case*.

In *Hazelton's Case* there was ample evidence of a fraudulent intent. Several cheques had already been dishonoured, and the prisoner knew he would not be allowed to overdraw, and in giving one of the cheques he said, "he wished to pay ready money." The conviction, therefore, was upheld on the authority of *Parker's Case* as to the false pretence that the cheque was a good and valid order, and it was also held that a false pretence that the prisoner had authority to draw the cheques was well established.

As between the banker and the payee, property passes as soon as the cash or notes given in payment of the cheque are delivered into the physical possession of the payee. (See *Chambers* v. *Miller*, 13 C. B. N. S. 125, in which case the payee was counting over the money a second time, and it was held that the banker could not demand a return of it. See also *R.* v. *Prince*, 32 L. T. 700; 11 Cox, C. C. 193.

CHAPTER IX.

CHEQUES AS EVIDENCE—WHAT A CHEQUE IS EVIDENCE OF.

74.—The production of a cheque drawn by the debtor payable to and indorsed by a person, suing as creditor, is evidence of payment, and the production of a cheque indorsed by a person employed to receive payment on behalf of such creditor is evidence of payment.

(*Egg* v. *Barnett*, 3 Esp. 196.)

75.—But the production of a cheque drawn by the debtor payable to the creditor, but not having been indorsed by him nor otherwise shown to have passed through his hands, is not evidence of payment.

(*Egg* v. *Barnett*, *supra*, Lord Kenyon, at p. 197.)

It is open to the creditor to show that the cheque was given in respect of a transaction other than that whereon he is suing. (Same case, Lord Kenyon, *loc. cit.*)

76.—The drawer need not show that he gave the cheque to the creditor, provided there is evidence, from

the creditor's indorsement or otherwise, that the cheque passed through the creditor's hands.

Mountford v. *Harper*, 16 M. & W. 825, explaining *Lloyd* v. *Sandilands*, Gow, 15, where, if the report be correct, Dallas, C.J., decided that proof of B. drawing a cheque (evidently a "bearer" (*a*) cheque) payable to A., and of A. receiving payment, is not evidence to show that B. paid the cheque to A., "as it might have been given to a third person, and through that third person might have got into the hands of A." (at p. 16). We confess we cannot think the suggestion made in *Mountford* v. *Harper* (*supra*) that the word "debt" ought to be substituted for the word "payment" at the end of the judgment of Dallas, C.J., is very intelligible. It stultifies the grounds of the judgment.

It appears to us that *Mountford* v. *Harper* is in conflict with *Lloyd* v. *Sandilands*.

Where a cheque is payable to "Order," the indorsement of the payee would be evidence that he received the cheque direct from the drawer, as no title can be made by delivery of an unindorsed order cheque. (*Whistler* v. *Forster*, 32 L. J. C. P. 161.)

(*a*) Order cheques were unknown before 16 & 17 Vict. c. 59, was enacted.

77.—The production of a cheque not presented is not per se evidence of a debt from the drawer to the payee.

(*Pearce* v. *Davis*, 1 M. & Rob. 365.)

78.—The production of a cheque is primâ facie evidence, not of a loan by a banker to his customer, but of a repayment.

In *Fletcher* v. *Manning*, 12 M. & W. 57, the plaintiffs, assignees of C., a bankrupt, sought to prove a debt due to J. L. & Co., as petitioning creditors in the bankruptcy of C.

They produced cancelled cheques drawn on J. L. & Co. by C., and a clerk from J. L. & Co. stated, from recollection only, that at the time when these were drawn C.'s account was greatly overdrawn. As the books were not in Court, the cheques were rejected as evidence of a debt from C. to J. L. & Co., since *primâ facie* they were evidence only of a repayment of a debt by J. L. & Co. to C., C. being a customer of J. L. & Co., his bankers.

79.—The production of a cheque drawn by the plaintiff payable to the defendant, and proved to have been paid to him, is not evidence per se to establish a loan by the plaintiff to the defendant, rendering the defendant the plaintiff's debtor. It is rather, in the

absence of proof of any loan transactions, to be presumed to be a repayment by the plaintiff of a debt due to the defendant.

(*Carey* v. *Geerish*, 4 Esp. 9, Lord Kenyon; *Graham* v. *Cox*, 2 C. & K. 702.)

In *Aubert* v. *Walsh*, 4 Taunt. 293, it was held that the defendant could not set off a cheque paid by him to the plaintiff, as, without further evidence, there was nothing in this to show a debt due from the plaintiff to the defendant, *i.e.*, *primâ facie* the cheque was a repayment, not a loan by defendant to plaintiff.

80.—A cheque, though primâ facie evidence of a repayment, may be shown by other evidence to have been a loan by the drawer to the payee.

(*Boswell* v. *Smith*, 6 C. & P. 60. Tindal, C.J., left it to the jury to say whether a cheque for 100*l.* was a repayment of a debt of 32*l.* and something more, or was a loan of 100*l.*)

81.—Where a cheque is not received as money, and is not cashed, it will not operate as evidence of a payment.

(*Hough* v. *May*, 2 H. & W. 33, where the jury found that an uncashed cheque for 8*l.* 11*s.* was not received as part payment of a bill for 8*l.* 18*s.*, and

found for the plaintiff for the latter sum, leave being reserved to the defendant to move to reduce the verdict to 7*s*. if the Court thought the cheque a payment. In discharging the rule, Denman, C.J., said, "The cheque of itself could not be any payment. It must have either been accepted at the time as money by the party taking it, or it must have been afterwards paid" (at p. 34).

82.—The acceptance by a creditor of a cheque in his favour drawn by the debtor operates as a payment, unless the cheque be dishonoured.

(*Pearce* v. *Davis*, *supra*. *Bridges* v. *Garratt*, 5 C. P. 451; *Pape* v. *Westacott*, 1894, 1 Q. B. 272.) In *Bridges* v. *Garratt* the cheque was paid to a mutual agent of the parties, and crossed to his banker, who detained it on account of a debt due to him from the agent; held a good payment against the creditor. In *Pape* v. *Westacott* the cheque was dishonoured. Where A. assigned "all outstanding debts," *inter alia*, this did not include cheques held by him but not yet presented for payment. The payment subsequently made related back to the time of delivery. (*F. Hadley & Co.* v. *F. Hadley*, 1898, 2 Ch. 680.)

83.—Entries in a banker's pass book are not conclusive against the banker, unless the customer by

acting upon them as correct has estopped the banker from denying the truth of them.

(*Commercial Bank of Scotland* v. *Rhind*, 1 Macq., H. L. 643; *Gaden* v. *Newfoundland Bank*, 1899, A. C. at p. 286.)

Subject to the provisions of the Bankers' Book Evidence Act (42 & 43 Vict. c. 11), a copy of an entry in a banker's book, which term includes ledgers, day-books, cash books, account books, and all other books used in the ordinary business of the bank, is in all legal proceedings, civil or criminal, including arbitrations, and for or against anyone, to be received as *primâ facie* evidence of such entry and of the matters, transactions, and accounts recorded therein, provided that proof be given that the book was at the time of making the entry one of the ordinary books of the bank, and is in the custody or control of the bank, and that the entry was made in the ordinary course of business. (42 & 43 Vict. c. 11, ss. 3, 4 and 10.)

By s. 5 it must be proved that the copy has been examined with the original.

S. 9 defines what is a "bank" and a "banker" within the Act.

By s. 6 the bank is not compellable to produce the original books, in proceedings to which it is not a party, without an order of the Court.

An order to inspect and take copies of entries in the bank books may be obtained, but the bank is to be served three clear days before such order is to be obeyed. (S. 7.)

We cite these provisions because cases may occur in which the cancelled cheques are not available, having been lost or destroyed, and it may therefore be necessary to have recourse to the entry in the bank books. If for example the defendant A. B. swears he paid X. Y. a cheque for 10*l.* for a bill for hire of horses and cannot produce the cancelled cheque, proof that, on or about the day when he swears he drew it, a cheque for 10*l.* payable to X. Y. was placed on the debit side of A. B.'s account throws on X. Y. the burden of proving that it was a cheque given in respect of some other transaction. It has been regretted by Judges that bankers do not credit cheques to customers, except as "cash" or "cheque"; there is generally nothing to identify the drawer. In X. Y.'s pass book the entry would merely be 10*l.* to his credit, and there would be nothing to show that it was really A. B.'s cheque for 10*l.*

CHAPTER X.

CHEQUES AS TENDER, ACCORD AND SATISFACTION—CHEQUES AS DONATIONES MORTIS CAUSA, AND INTER VIVOS.

84.—A cheque is not legal tender, but if the creditor objects to receive it on some other ground, as that it is for the wrong amount, he is to be taken to have waived the objection to the cheque as tender in point of form.

(*Jones* v. *Arthur*, 8 Dowl. Points of Practice, 442; 4 Jurist, 859.)

There is a note on p. 187 of Tidd's Practice, 9th edition, that in *Willy* v. *Warren*, 1787, Buller, J., held that a draft on a bank was good tender, if not objected to on the ground of form.

The case is also mentioned in Roscoe, Ev. p. 349, 9th edition.

85.—The acceptance of a cheque in payment for a larger sum due (subject to an inference of fact that it was not accepted in full satisfaction) amounts to an

"accord and satisfaction," and the creditor accepting such cheque cannot sue for the balance of the debt originally due.

(*Goddard* v. *O'Brien*, 9 Q. B. D. 37.)

The doctrine of "Accord and Satisfaction" is this:—The acceptance of a smaller sum of money in satisfaction of a larger debt does not amount to an "accord and satisfaction," nor preclude the creditor suing for the balance, but the acceptance of a thing, not being money, of smaller value than the debt due does amount to an accord and satisfaction, and precludes the creditor from suing for the difference in value. A cheque is a negotiable instrument and is not cash, and hence the acceptance of it may amount to "accord and satisfaction."

86.—Where a cheque is tendered in full payment of a debt, it may be retained by the payee as a payment on account of a larger debt. The mere retention of the cheque is not conclusive evidence of an accord and satisfaction. It is question of fact in any case, whether such a cheque has been retained by the creditor as a payment on account or as an accord and satisfaction.

(*Day* v. *McLea*, 22 Q. B. D. 610; *Ackroyd* v. *Smithies*, 54 L. T. 130.)

87.—There can be no valid donatio mortis causâ of a cheque drawn by the donor unless it be paid or negotiated in his lifetime.

(Cf. *Tate* v. *Hilbert*, 2 Ves. Jun. 120, 4 Bro. C. C. 286; *Rolls* v. *Pearce*, 5 Ch. D. 730; *Veal* v. *Veal*, 29 L. J. Ch. 321; *Bouts* v. *Ellis*, 22 L. J. Ch. 716, 4 D. M. & G. 249; *Williams* v. *Davis*, 33 L. J. Prob. 127; *In re Mead*, 15 Ch. D. 651; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198.)

We have seen that, by s. 75 of the Act, the banker's authority to pay a cheque is revoked by notice of drawer's death or by countermand of payment. Hence the failure of a gift of a cheque on the drawer's death, as the donee cannot sue the estate in the absence of consideration.

In *Tate* v. *Hilbert* (*supra*), it is clearly laid down that there can be no valid *donatio mortis causâ* of the donor's cheque, which is intended as an immediate gift, unless it is cashed or negotiated in the lifetime of the donor. (See 2 Ves. Jun. at p. 118.)

In *Rolls* v. *Pearce* (*supra*), Malins, V.-C., held that a negotiation by the donee in the donor's lifetime saves a gift of a cheque from failing. Thus where a man *in extremis* gave two cheques to his wife, which she negotiated before his death, he held that there had been a good *donatio mortis causâ*. (Cf. *Bouts* v. *Ellis*, *supra*.)

A gift of a banker's deposit note with a form of cheque on the back, is good as a gift of the deposit note, if the cheque be filled in for the whole amount of the deposit; *secus* if filled in for a smaller sum. (*In re Dillon*, 44 Ch. D. 76; *In re Mead*, 15 Ch. D. 651.)

88.—There can be a valid donatio mortis causâ of a cheque drawn by another and payable to bearer or to the donor or order, even though in such latter case the donor die without indorsing such cheque.

(*Veal* v. *Veal*, 27 Beav. 303, 29 L. J. Ch. 321; *In re Mead*, 15 Ch. D. 65; *Clement* v. *Cheesman*, 27 Ch. D. 631.)

89.—There can be no valid donatio inter vivos of a cheque, drawn by the donor, not paid, negotiated or presented in the donor's lifetime.

(*Tate* v. *Hilbert*, 2 Ves. Jun. 111, 4 Bro. C. C. 286; *Jones* v. *Lock*, 35 L. J. Ch. 117; *Rolls* v. *Pearce*, 5 Ch. D. 730.) In *Bromley* v. *Brunton*, L. R. 6 Eq. 275, the cheque was presented in the donor's lifetime, but not paid, owing to the bank doubting the signature. It was held that, as the gift was as complete as the donor and donee could make it, it was good as a gift *inter vivos*.

This case was distinguished in *In re Beaumont* (1902), 1 Ch. 889, where there was the additional

fact that the drawer's account was overdrawn, and there was held to be no valid *donatio mortis causâ*.

In all cases there must be a delivery of the cheque in the lifetime of the donor (*Bromage* v. *Lloyd*, 1 Exch. 32), and no reservation of disposition over it. (Cf. *Riddell* v. *Dobree*, 10 Simons, 244.)

CHAPTER XI.

LIMITATION OF ACTIONS ON CHEQUES.

90.—No action can be maintained upon a cheque after six years from the date of such cheque, unless the defendant has within six years before action acknowledged in writing signed by him or his authorized agent (*a*) his indebtedness upon such cheque or has paid any part of such debt or any interest thereon. (21 Jac. I. c. 16, 9 Geo. IV. c. 14, 19 & 20 Vict. c. 97.)

There are several points to be noted.

(1) Time runs from the date of the cheque or the date of delivery if later, and not from the date when it was presented for payment. (Cf. *Christie* v. *Fonsick*, Sel. N. P., 9th edition, p. 351, and *Megginson* v. *Harper*, 2 C. & M. 322) (*b*).

(2) But where a cheque is retained for a time either as security for advances to be made or

(*a*) A joint debtor is not as such an agent.

(*b*) *Garden* v. *Bruce*, L. R. 3 C. P. 300, is a different case. There a loan was made by cheque. In an action to recover the loan it was held that the time ran from when the cheque was *cashed*, not from when it was dated. The action was *not on the cheque*, which was, of course, paid and cancelled.

because there are no funds to meet it, and the drawer has so informed the holder, the time will not run in favour of the drawer until the advances are made or the duty or right to retain the cheque is otherwise put an end to. (See *Ex parte Boyse*, 33 Ch. D. 612; and *In re Bethell*, 34 Ch. D. 561. The facts of the latter case are shortly stated in the notes to § 66.)

(3) If the Statute of Limitations is relied upon, it must be specially pleaded in the defence.

(4) The acknowledgment must not be inconsistent with a promise to pay. A repudiation of an admitted liability or a letter written "without prejudice" will not suffice. If the acknowledgment be conditional, the plaintiff must prove the fulfilment of the condition. (*Tanner* v. *Smart*, 6 B. & C. 603; *A'Court* v. *Cross*, 3 Bing. 328; *Meyerhoff* v. *Froehlich*, 4 C. P. D. 63; *Langrish* v. *Watts*, [1903] 1 K. B. 636.)

(5) As against an indorser time would not run in his favour until the cheque has been dishonoured on presentment for payment, for until then there would be no recourse against an indorser. (See Hewitt's Statute of Limitations, pp. 14 and 15, and cases there cited.) It will be remembered that failure to give an indorser due notice of dishonour discharges him. (Ss. 45 and 48.)

(6) Payment or acknowledgment to be effectual

must be to the plaintiff or his authorized agent. (*Stamford Banking Co.* v. *Smith*, 1892, 1 Q. B. 765, etc.)

91.—If the person entitled to bring an action upon a cheque is an infant when the cause of action accrues, such person will, after attaining twenty-one years, have six years allowed within which to bring his action. (21 Jac. I. c. 16, s. 7.)

There was also a provision in the above-cited section of 21 Jac. I. c. 16, whereby a woman had six years wherein to sue after becoming "discovert." But it appears to us that, with regard to simple contract debts, this provision has already become obsolete by the effect of the Married Women's Property Act, 1882. (See *Lowe* v. *Fox*, 15 Q. B. D. 667, 676.)

92.—If a person entitled to bring an action upon a cheque is of unsound mind when the cause of action arises, such person will after becoming sane have six years within which to bring his action. (21 Jac. I. c. 16, s. 7.)

93.—Where a person entitled to sue upon a cheque is under the disability of infancy or unsoundness of mind and so continues until his death, his personal representative has six years within which to bring an action.

(See *Townsend* v. *Deacon*, 3 Ex. 706, and cf. *Wych* v. *E. I. Co.*, 3 P. W. 309.)

94.—Where two or more persons are jointly entitled to sue upon a cheque, time will run against all of them, notwithstanding that one or some, but not all, are under a disability; but where such persons have a joint and several cause of action, time will not run against any under a disability, until such disability be removed.

(Hewitt, p. 58, citing *Roe* d. *Langdon* v. *Rowlston*, 2 Taunt. 441.)

95.—Where a person liable to an action upon a cheque is beyond the seas when the cause of action accrues, the party entitled to sue has six years after the return of such person from beyond the seas within which to sue. (4 Anne, c. 16, s. 19.)

96.—Where one or more, but not all, of several persons jointly liable upon a cheque is or are beyond the seas at the time the cause of action accrues, time nevertheless runs in favour of such as are not beyond the seas, but judgment against such as are not beyond the seas does not bar the right of action against such as are beyond the seas when they return.

(19 & 20 Vict. c. 97, s. 11, the last part dispensing with the general rule as to release of joint debtors by judgment against one of them.)

97.—Where a person entitled to sue upon a cheque is under a disability, and before the cesser of such disability falls under a further disability, it seems that he has six years from the cesser of such disability as is the last to be removed within which to bring his action, and where a person liable to be sued is beyond the seas, and before his return the person entitled to sue falls under a disability, such latter person, it seems, has six years within which to bring his action after the removal of his disability or the return of the person liable to be sued, whichever happen latest.

(Hewitt, pp. 61 and 62, citing *Lessee of Supple* v. *Raymond*, Hayes, Ir. R. 6, and other cases.)

INDEX.

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